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According to the Supreme Court of Nebraska, the laundry business is not within the operation of the State anti-trust statute, this for the reason that a laundry is not a manufacturing establishment within the meaning of the statute, which was designed to prevent "manufacturers" and "dealers" in articles of commerce from combining for the purpose of lessening competition, regulating production and increasing profits. To the court it was plain that a laundry, the business of which is to wash and iron linen, and other articles of wearing apparel and domestic use, which have become soiled in the service for which they were fabricated, is not a manufacturing establishment, within the meaning of the section quoted. In the common understanding, the function of a laundry is to make clothes clean, rather than to make clean clothes.

The case arose in the shape of an injunction to prevent the violation of an agreement on the part of the defendant not to engage in the laundry business in a certain city for a certain period, and the defense was that it was a contract in restraint of trade within the purview of the anti-trust statute. But the court held, reversing the lower court, which had rendered judgment for defendant, that all contracts in restraint of trade are not forbidden by the act, but only such as are entered into by parties who are "engaged in manufacturing, selling or dealing in the same, or any like manufactured or natural products;" and that an agreement in partial restraint of trade which is not within the inhibition of the statute aforesaid is valid, and may, in a proper case, be enforced by injunction.

"Theosophy" as well as "Christian Science" is receiving attention by courts of law, as witness the recent case of New England Theosophical Corporation v. City of Boston, decided by the Supreme Judicial Court of Massachusetts. The case came before the court in the form of an application for the abatement of taxes assessed against real estate of the "New England Theosophical Corporation." The law of Massachusetts exempts from taxation, the property of literary, benevolent, charitable and scientific institutions. The court found no difficulty in deciding that such corporation is neither benevolent nor charitable, notwithstanding that one of its declared purposes was "forming the nucleus of a universal brotherhood of humanity." It was also plain that a corporation having for its paramount object the dissemination of theosophical ideas, and the procuring of converts thereto, is not a "scientific" institution, since, if there is any connection between theosophy and any kind of science, it is only incidental to the study and promulgation of a system of speculative philosophy. The only doubt seemed to be whether the corporation was a literary institution, but the court held in the negative even though in furtherance of its main object, books were collected, instruction given, and literary work done. "The word 'literary'" says the court, "has no technical, legal meaning, and there is some difference of opinion as to what is meant in statutes exempting literary institutions or societies from taxation. In England it is held that a school for educating teachers is not a literary society. Reg. v. Pocock, 8 Q. B. 729. See also Common Council v. McLean, 8 Ind. 328; Philadelphia v. Overseers of Public Schools, 170 Pa. St. 257, 32 Atl. Rep. 1033; Kendrick v. Farquhar, 8 Ohio, 189. In Trustees of Wesleyan Academy v. Inhabitants of Wilbraham, 99 Mass. 599, it was said by Chief Justice Chapman, in considering the exemption of the academy from taxation: 'The academy of the plaintiffs is a literary and scientific institution, duly incorporated, and the only questions that are raised in the case relate to the character of the property which the defendants have assessed.' The institution in this case was incorporated 'for the purpose of promoting religion and morality, and for the education of youth, in such of the liberal arts and sciences as the trustees for the time being shall direct.' In Mt. Hermon Boys' School v. Gill, 145 Mass. 139, 13 N. E. Rep. 354, it was conceded that the plaintiff was one of the institutions exempt from taxation, and the court said that it was 'very properly conceded.' The institution in this case was organized for

the 'education of boys.' * * * The paramount object of the petitioner is the dissemination of theosophical ideas, and the procuring of converts thereto. Everything else is subordinate. The fact that, in furtherance of this object, books are collected, instruction given, and literary work done, does not make the petitioner a literary institution. To hold otherwise would be to permit any seven men who believed in any particular theory on any subject to live free from taxation, by forming a corporation, buying a house, living in it, editing a newspaper, and writing articles to other newspapers in favor of their views, with the hope of gaining converts. This is not, in our view, the intent of the legislature."

NOTES OF IMPORTANT DECISIONS.

NEGOTIABLE INSTRUMENT — INDORSEMENT—CHECK—FORGERY.— In First Nat. Bank v. Farmers' & Merchants' Bank, 76 N. W. Rep. 430, it was held by the Supreme Court of Nebraska, that an indorser of a negotiable instrument guaranties the genuineness of prior indorsements. Accordingly, where a check is drawn payable to the order of a named payee, one who takes the check on the forged indorsement of the payee, and himself indorses it, is liable to the bank on which the check is drawn, if that bank pays it in ignorance of the forgery, in the absence of circumstances estopping the drawer from setting up the forgery. It appears that there was presented to a trust company by its local correspondent an application for a loan, offering certain land as security. The application was signed "B," and an abstract also tendered showed title in B. The loan having been accepted, a bond and mortgage were tendered, purporting to be executed by B. The company sent to the correspondent a check payable to the order of B. This check was presented to a bank, bearing the indorsement "B," and also the indorsement of the correspondent. The bank paid the check to the correspondent, and itself indorsed it, and the bank on which it was drawn paid it. B did not own the land, and the abstract was false and forged. It was held (1) that if the application was made and the bond and mortgage executed by a third person, and that person indorsed the check, the indorsement was genuine, whether or not his real name was B, and although he did not own the land; (2) if the correspondent himself signed the application, bond and mortgage, and indorsed the check, the indorsement was a forgery. It was also held that a principal is not estopped to deny the authority of his agent to perform a particular act, on the ground that it was within the agent's apparent authority unless the authority to perform it was apparent to the person dealing with the agent, and by him relied on.

CONTRACT—INFLUENCING CITY LEGISLATION—PUBLIC POLICY—PAVING CONTRACTS.—It appeared in Crichfield v. Bermudez Asphalt Paving Co., 51 N. E. Rep. 552, that the defendant company employed plaintiffs as its agents "to solicit and promote" the asphalt-paving business in Chicago. The consideration was a small monthly salary, and a commission on contracts secured, which in fact amounted to 10 times the salary. The contracts for paving were to be confined to Chicago, and were to be made with said city. It appeared inferentially from the contract that the procuring of the passage of ordinances for paving streets was to be a part of plaintiffs' duties. Plaintiffs were to bear all incidental expenses in promoting the work, and "in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt paving." When a street is to be paved in Chicago, an ordinance for the improvement must first be passed, and objections may be filed later to the commissioners' report as to the cost of the improvement and the amount of assessments, by interested landowners; and the contracts must be let to the lowest bidder, after advertising for bids, except that a contract may be entered into without advertising for bids where two-thirds of the common council so vote. It was held that the contract was void, as against public policy, since in effect a contract to solicit, by the exercise of influence and other means, the passage of ordinances and the letting of contracts by the members of the common council, and that the rule which makes void a contract for a contingent compensation for obtaining legislation applies to the common council of a city as well as to the legislature of a State. A promise to solicit and promote the asphalt-paving business in a certain city, and to bear all expenses "in aiding and assisting in the election of officials, or in any other matter pertaining to the promotion of asphalt paving," in consideration of a certain sum per month, and a commission contingent on the paving contracts secured, is entire and indivisible, so that the illegal part, in regard to influencing city officers, makes the entire contract void. On an issue whether an executed contract is void as against public policy, it is immaterial whether anything improper was done or was designed to be done thereunder by the party seeking to enforce it. The objection that a contract is void as against public policy may be urged on appeal, though not raised in the pleadings or in the trial court.

BANKRUPT LAW—EFFECT ON LOCAL INSOLVENCY PROCEEDINGS.—In Parmeter Mfg. Co. v. Hamilton, 51 N. E. Rep. 529, decided by the Supreme Judicial Court of Massachusetts, it was held that since the United States Bankruptcy Law (Act July 1, 1898), declares that the act should go into full force and effect on its passage, and saves

only proceedings commenced under State insolvency laws before the passage of the act from being affected by it, it supersedes all State insolvent laws from the date of its passage. The court said: "The United States Bankruptcy Law, passed on July 1, 1898, ends with the following provision: 'This act shall go into full force and effect upon its passage; provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary proceedings shall be filed within four months of the passage thereof. Proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.' The question in this case is whether this act so far superseded the insolvency laws of this commonwealth from the time of its passage as to deprive our courts of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898. This depends upon the intention of congress, as manifested by the language above quoted. Of the power of congress to pass an act having this effect, there is no doubt. Const. U. S. art. 1, sec. 8, cl. 4; Griswold v. Pratt, 9 Metc. (Mass.) 16; *In re* Klein, 1 How. 277, 280, 281; Sturges v. Crowninshield, 4 Wheat. 122-192; Ogden v. Saunders, 12 Wheat. 213. 369. The language is materially different from that of the Bankruptcy Act of 1867, and from that of the earlier Bankruptcy Law of 1841. See United States Statute of 1867, ch. 176, Rev. St. U. S.; Day v. Bardwell, 97 Mass. 246; Judd v. Ives, 4 Metc. (Mass.) 401; Swan v. Littlefield, 4 Cush. 574. The argument that the change in question was intentional is almost irresistible. The act is 'to go into full force and effect upon its passage,' that is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy affecting the settlement of estates determined by it (sec. 3), to have the right of debtors to file voluntary petitions, and of creditors to file involuntary petitions, determined by it (sec. 4), and to have preferences and liens governed by the provisions of it (secs. 60 and 67). These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the States, and perhaps different from those found in the laws of any State and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions, and four months in the case of involuntary petitions. Whenever the proceedings are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of State courts provides for cases commenced in those courts before the passage of the act. The plain implication is that proceedings commenced in the State courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all State laws in regard to insolvency from the date of the passage of the statute."

ELECTIONS — NOMINATION OF CANDIDATES — AUTHORITY OF CONVENTION.—It is held by the Supreme Court of Minnesota, in White v. Sanderson, 76 N. W. Rep. 1021, that a duly assembled convention of a political party may delegate its power, and confer upon a duly selected or properly designated committee full authority to nominate candidates for office, to be voted for at an ensuing election; and such candidates, when so nominated, are entitled to have their names placed on the official ballots as the regular nominees of the party represented by the convention, upon complying with the provisions of the election law in respect to filing certificates of nomination and the payment of nominating fees, and that the certificates of nomination in such cases may be executed by the presiding officer—chairman—and secretary of the nominating committee. The court says: "The questions are: First. Can a county convention delegate its power, and confer upon a committee the authority to nominate a candidate for office, who, when so nominated, will be entitled to file a certificate of nomination in accordance with the provisions of Gen. St. §§ 36-38, and, upon paying the prescribed fee, to have his name placed on the official ballots as the regular nominee of the party represented by the convention? Second. If it can, should the certificate of nomination be executed by the presiding officer and secretary of the convention, or by the chairman and secretary of the committee? We are clearly of the opinion that, if such a proceeding is in accordance with party usage and custom, a convention can delegate its power and authority to make nominations to a committee duly selected or designated for that purpose. And we are also of the opinion that, when a nomination is made in this manner, a certificate thereof executed, in form, by the chairman and secretary of the committee, is all that is required, under the law. Section 38, *supra*. In the case of Manston v. McIntosh, 58 Minn. 525, 60 N. W. Rep. 672, it was said that in this election law (Laws 1893, ch. 4) there is a total absence of anything which indicates that the legislature intended to regulate the manner in which political parties should proceed to organize conventions, or in making nominations. It was also said that it was not the purpose of the legislature to suppress and prevent well-known usages and practices in regard to political conventions. And it was held that nominations might be made at mass

conventions, the members of which had not been elected as delegates at primaries or caucuses. The law was interpreted in this respect in accordance with what seemed to be its spirit and intent, and not strictly or technically. In the very recent case of Phillips v. Gallagher (Minn.), 76 N. W. Rep. 285, it was stated that a political convention has control over its own proceedings and officers, in the absence of statutory regulations, and may proceed according to party usages and customs. The convention in question was not prohibited by any statute from conferring its right to nominate upon the county committee, and it stands admitted that this method of naming a candidate is in accordance with party usage and custom. In fact, this practice of referring nominations to committees composed of members of the convention, or organized for campaign purposes, with power to act until another convention is held and another committee is selected, is a matter of common knowledge. We are not to suppose that the legislature intended to prohibit the well-known methods of procedure, in the absence of any reference to them. The statute in Montana is substantially the same as our own in reference to nominations, and in 1893 it was there held by the supreme court that under their statute a political convention had power to delegate its authority to nominate to a committee, and that such a nomination, made after the convention adjourned, was in effect the act of the convention itself, and therefore valid. State v. Benton, 13 Mont. 306, 34 Pac. Rep. 301. It was well stated in the opinion that if the power and authority to nominate were conferred upon a committee by the convention, and before its adjournment a nomination was reported, acted upon and ratified, no one would contend that the nomination was not the act of such convention. And then the court proceeded: 'Such supposititious case differs from the facts in the case before us in only one particular: Instead of the convention ratifying the act of the committee after it was done, as above illustrated, it, in the actual case before us, ratified the act of the committee in advance, and did so expressly.' When the convention in question here delegated to the county committee its right and authority to make a nomination for the office of judge of probate, it approved and ratified in advance, and in express terms, the nomination subsequently made. A nomination so made must be deemed to be the act of the convention itself. As before stated, the certificate may be executed by the chairman, who is the presiding officer and the secretary of the committee. The presiding officer and secretary of the convention would have no actual knowledge of the action of the committee, unless they happened to be members of that body, and therefore, under ordinary circumstances, unable to verify the nominating certificate as by law required. To hold that this document must be executed by the officers of the convention would practically nullify our interpretation of the statute as to nominations made by a committee. Again, this view of the proper method of certifying where a committee nominates is in line with the provision (section 45) respecting the certificate where a vacancy occurring after a nomination has been filled by a committee. Such certificate is executed by the chairman and secretary of the committee naming the candidate."

RAILROAD COMPANY — STREET RAILWAY—NEGLIGENCE—PLEADING.—In Terre Haute Electric Ry. Co. v. Yant, it was held by the Appellate Court of Indiana, reversing the lower court, that a street railway company is not liable for failure to stop a car running at a proper speed, on approaching a frightened horse, where it does not appear that thereby the horse could have been controlled, or that the motorman had reason to apprehend the occurrence of an accident, and that averments that a street car was run carelessly and negligently, and run at a high rate of speed, making great noise, do not state facts showing negligence. The court says: "The complaint charges that on the day of the alleged injury, defendant owned and operated a street-railway line with double tracks running along a public street in the city of Terre Haute, and along the center of the National road east of said city; that on said day, while plaintiff and his wife were traveling in a one-horse buggy along said highway, and on the south side thereof, and going east, they met one of the defendant's electric street cars going west; that 'the said horse saw and heard the said car traveling as aforesaid, and said horse did then and there become frightened at said fast-going car, and noise caused thereby, and began to plunge and start, and was becoming unmanageable; that thereupon this plaintiff jumped out of his said buggy, and took hold of the harness and bridle on and about the said horse's head, so that he would be more able to manage and control said horse, all of which was in plain view of defendant and defendant's agents who were controlling, operating, and running said car, and said servant ought to have seen, and did see, some time before the said car had come near said horse, the imperiled condition and position of the plaintiff caused by the fast-going car as aforesaid; that, notwithstanding the plaintiff's dangerous and imperiled position and condition, caused as aforesaid, the defendant, by its agent, wrongfully, carelessly, and negligently ran said car at a high rate of speed as aforesaid, toward, on, near to, and within but a few feet of this plaintiff and the said horse, which caused said horse to become entirely unmanageable, and to start, plunge, turn, and to run, throwing this plaintiff down, and causing said horse to run over and trample on said plaintiff.' It is not claimed by appellee's learned counsel that appellant was at fault in running its car and making the noise necessarily incident thereto, nor that it was run, upon the occasion in question, in an improper manner, up to the point where it was alleged the horse was becoming unmanageable; but that, when the motorman saw that ap-

pellee's horse was frightened and becoming unmanageable, he should have stopped the car. Booth on Street Railway Law, in section 298, states the law in the following language: 'And for obvious reasons companies which have been duly licensed, and therefore have as much right to run their cars in the streets as others have to drive through them with their horses and vehicles, cannot, ordinarily, be held responsible for horses taking fright at the appearance, management, or noise of the car. If a horse takes fright at an approaching car, and, because the car is not stopped, * * * becomes unmanageable, and runs away, injuring the driver or others, the company is not liable, unless the conduct complained of in the management of the car is attributable only to a wanton and malicious disregard for the safety of the driver or other travelers upon the street. * * * To the extent that whether travelers, whether in cars, on foot or in private vehicles, have the right to proceed without unnecessary interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable; for if drivers, motormen or gripmen were required to stop their cars, slacken their speed, or omit or discontinue necessary signals, upon which the safety of others depends, because timid horses may become frightened, or already manifest symptoms of fear, not indicating imminent peril, street-railway service would be so materially embarrassed by numerous delays as to defeat the purpose for which such franchises are granted; and the dangers to the general public, for whose protection warnings are given, would be greatly enhanced'—citing the following, among other, cases: Chapman v. Railway Co., 27 W. L. B. 70; Coughtry v. Railway Co. (Oreg.), 27 Pac. Rep. 1031; Cornell v. Railway Co., 82 Mich. 495, 46 N. W. Rep. 791. In Doster v. Railway Co., 23 S. E. Rep. 449, the Supreme Court of North Carolina said: 'Whenever a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it gives unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed, unless the animal is actually on the track in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision.' In Steiner v. Traction Co., 134 Pa. St. 199, 19 Atl. Rep. 491, which was an action to recover for injuries received occasioned by the running away of a team of horses standing by the street-railway track, growing out of the continuous ringing of the bell, the court said: 'If the gripman saw that plaintiff's horses were restive, it does not follow that he had reason to apprehend the accident that occurred. The plaintiff, according to his own testimony, was at the heads, and might naturally be supposed to be able to control them.' The pertinency of these extracts from the text-books and reports justify, we think, the foregoing lengthy quotations. The complaint, judged by the law as set out in the foregoing authorities, is fatally defective. It does not appear from the averments that appellee would have been able, because of the gentleness of the horse, or from any other reason, to have controlled it, and prevented the injury, had the car been stopped before its near approach; nor that the motorman had reason to apprehend the accident that occurred. Neither do they show that he manifested a wanton disregard for the safety of appellee; nor that he had reason to believe that appellee, who was in the position which he believed the best to manage his horse, would not be able to do so. The averments that the car was being run at a high rate of speed and making a great noise, and that it was run carelessly and negligently, are not averments of facts showing negligence. Many decisions might be cited from the reports of this and other States in which railway companies have been held liable for damages occasioned by frightening horses. Upon examination it will appear that the liability was held to attach on the ground of negligence when the fright has been caused by the running of the train or car in an unusual, unnecessary, or improper manner, or when those in charge, seeing the injured party in imminent peril, have acted in a manner attributable only to a wanton disregard for the safety of those in peril. To hold the complaint sufficient would be to declare it to be the duty of a motorman operating a car in a lawful manner to at once stop or slacken its speed at the sight of a frightened horse on the public highway adjacent to the track, although held by his owner in a manner from which it might fairly be supposed he would be able to control him. To so hold, we believe, would be error. The complaint in Railroad Co. v. Juday, 19 Ind. App. 436, 49 N. E. Rep. 843, cited by appellee, in its averments charged that the servants of the railway company operating the hand car at which plaintiff's horse was frightened refused to check the car, although signaled and requested to do so; this at the time plaintiff was in the buggy, with two other persons, when said agents saw that the horse was unmanageable. These facts alone were sufficient to show a wanton disregard for the safety of those in the buggy, amounting to negligence."

ABSOLUTE DEED OF A HOMESTEAD AS A MORTGAGE.

It is an ancient and very salutary rule of the common law that "parol, contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."[1] "No principle of evidence," has said the Supreme Court of the United States, by Mr. Chief Justice Waite, "is better settled at

[1] 1 Greenleaf, Evid. (14th Ed.), § 275.

common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.'"[2] There is one exception to this time-honored rule, originating in equity, which is almost as old, equally well settled, and, within its proper sphere of operation, quite as salutary as the rule itself. It is that a deed, absolute on its face, may, by parol evidence, be shown to be a mortgage; that is, evidence tending to show a parol agreement between the parties that a deed, otherwise absolute, was intended to secure an indebtedness, is admissible. "It is an established doctrine," in the language of the Supreme Court of the United States, by Mr. Justice Field, "that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money."[3] A proposition of law is never settled until it is settled right. It is settled right when it is founded on and supported throughout the entire extent of its operation by right reason. Such a rule, being invulnerable, admits of no question; it is the perfection of reason. Assuming that the rule about parol evidence and its exception fulfill the requirements of reason, let us inquire what that reason is. The reason of any rule is apparent in the purpose which it serves. Therefore, let us look to the purposes of these two rules. Having from time immemorial accustomed ourselves to the effect of this equitable exception to the rule of the common law, and adjusted our affairs with reference to its application as a rule, we are prone to forget that, though itself an inviolable rule, yet it constitutes but an exception to another rule, *i. e.*, the rule of exclusion, and that, as such exception, it is forced to find its support in some particular necessity more potent than that general necessity which supports the principal rule. What general necessity does the common law find to require the existence of the general rule excluding parol evidence in the case of a valid written instrument, to contradict or vary it? From its nature, its purpose must be to prevent perjury and fraud. The necessity is the same that gave birth to the statute of frauds. The analogy is in fact so close that it has often been supposed, though erroneously, that the rule about parol evidence applied only to writings required by the statute. To quote the Supreme Judicial Court of Massachusetts, by Parker, J.: "Another suggestion has been, that the practice of excluding oral testimony from the construction of written contracts has arisen from the operation of the statute of frauds and perjuries, which requires certain descriptions of contracts to be in writing."[4] What particular necessity, more important as to its object than the general necessity just noticed, does equity find to require the existence of the exception that an instrument which on its face is a deed may by parol evidence be shown to be no deed but a mortgage? We have no hesitation in pronouncing it to be the necessity of preventing unconscionable advantages from being taken of persons in embarrassed circumstances. "Necessitous men," said the Supreme Court of the United States, by Mr. Justice Curtis, quoting with approval the language of Lord Chancellor Eden,[5] "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."[6] The purpose, then, of the general rule, is to prevent wholesale perjury and fraud. This it does by removing the opportunity so to do. But in the very act of removing this general opportunity to defraud, presented by allowing parol evidence to contradict a writing, the common law created a particular opportunity to defraud, viz.: by precluding a person from showing by parol that he could obtain relief from financial embarrassment only by executing an absolute deed as security for a loan. Equity found that the prevention of such a grievous fraud was of more importance than the prevention of an occasional fraud which might result from allowing deeds to be thus varied by parol, and thereupon created this exception by removing the particular opportunity to defraud created by the general rule of the common law. This it did by ascertaining and giving effect to the real intention of the parties regardless of the writing—by enforcing the real contract, as would have been done in this particular case had no

[2] Bast v. First Nat. Bank, 101 U. S. 93, 96, 25 L. Ed. 794, 796.

[3] Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775, 776.

[4] Stackpole v. Arnold, 11 Mass. 30, 31, and cases cited.

[5] Vernon v. Bethell, 2 Eden, 113.

[6] Russell v. Southard, 12 How. (U. S.) 139, 152, 13 L. Ed. 927, 932.

general rule existed on the subject. To quote again the Supreme Court of the United States, by Mr. Justice Field: "That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties."[7]

Now, in removing the opportunity of crafty persons to take an unconscionable advantage of necessitous persons, equity created an opportunity of defrauding the family of the necessitous debtor of its homestead. This opportunity to defraud has in turn been removed by the statutory homestead laws. The legislatures of nearly all of the States, upon sufficient reason, as we must conclusively presume, have enacted that the homestead of the family cannot be conveyed or incumbered, except the instrument of conveyance or incumbrance be executed by the husband and wife. "For wise and humane reasons," declared the Supreme Court of Illinois, "to preserve to the debtor and his family a home and shelter, the estate is, by express enactment, secured to the husband and wife, and no waiver, release or conveyance of it can be valid that is not by their joint voluntary act and consent, expressed in the manner and form prescribed in the statute."[8] "It is the policy of the law," reasoned the Supreme Court of Iowa, "to preserve to every family a homestead. Such a course greatly subserves the interests of society and good government. Hence, the law has wisely thrown restrictions about the manner of conveying or incumbering a homestead."[9] It should be very clear that a mortgage consisting of an absolute deed and collateral parol agreement cannot be executed by the husband and wife, notwithstanding the deed itself be so executed; for how shall they execute a parol agreement? The transaction is a mortgage. The common law rule about parol evidence would suppress the actual transaction, except as it might be contained in the written instrument; thus removing the general opportunity to defraud in this as well as all other transactions; but creating also thereby, in this particular class of transactions, an opportunity to defraud embarrassed debtors. The equitable exception permits the ascertainment of the actual transactions in respect of deeds given to secure indebtedness; thus removing the particular opportunity to defraud embarrassed debtors; but creating also thereby, in respect of homesteads, an opportunity to defraud the family of the debtor. The statutory rule annuls such a transaction in respect of homesteads, thus removing the opportunity to defraud the debtor's family of its homestead. The legislatures have decided, upon great considerations, as we have seen, that a mortgage of the homestead is a fraud upon the family and subversive of the interests of society and good government, unless signed and acknowledged by both husband and wife. In case of an absolute deed of a homestead, so signed and acknowledged, which the parties agree orally shall be a mortgage, how is the homestead sought to be mortgaged? "Is it," in the language of the Supreme Court of California, "by the conveyance absolute on its face, or by the contemporaneous oral agreement, * * * or by both? Plainly, it requires both to create the incumbrance—to burden the estate with a debt. It must, therefore, follow that the incumbrance here was not created by an instrument executed and acknowledged by the husband and wife."[10] It may be asked if the legislatures in thus removing the opportunity to defraud the debtor's family of its homestead, may not have created another opportunity to defraud, *i. e.*, the creditor. Very true this may be, but the legislatures have decided (and finally, unless the homestead laws be unconstitutional) that the necessity to prevent fraud upon the family demands such safeguards against improvident mortgages with greater reason than the necessity of removing the opportunity thus created of defrauding a creditor who is ignorant of the law demands that such safeguards shall be dispensed with. And there is no power in the strong arm of the law, or in the relieving hand of equity, to establish any

[7] Peugh v. Davis, 96 U. S. 332, 336, 24 L. Ed. 775, 776.

[8] Kitterlin v. Insurance Co., 134 Ill. 647, 25 N. E. Rep. 772, 774.

[9] Spoon v. Van Fossen, 55 Iowa, 494, 4 N. W. Rep. 624. It is not to be supposed that this provision is for the benefit of the wife alone: "It should be noticed that even as to the husband, under the homestead act, the acknowledgment is an essential element." Merced Bank v. Rosenthal, 99 Cal. 39, 47, 31 Pac. Rep. 849, 853. "It was as much for the benefit of the children" as for the wife. Lees v. De Diablar, 12 Cal. 328, 330.

[10] Merced Bank v. Rosenthal, 99 Cal. 39, 47, 31 Pac. Rep. 849, 853.

further or additional rule or exception. The statute is the end of all argument. To quote the Supreme Court of Kansas, where this homestead provision is contained in the constitution of the State: "No matter how strong the equity may be, constitution is stronger. No matter how strong the appeal to the conscience of the chancellor, the organic law controls him."[11] No matter that the creditor was ignorant of the law. In the language of the same court in another case (wherein the defendant alleged in his answer that when the transaction occurred he was a new-comer in the State and ignorant of the homestead laws of Kansas): "The ignorance or mistake of law by the defendant cannot avail him. He is presumed to know the law."[12]

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[11] Jenkins v. Simmons, 37 Kan. 496, 15 Pac. Rep. 522.
[12] Thimes v. Stumpff, 33 Kan. 53, 5 Pac. Rep. 431, 435.

CREDITORS' SUITS—JUDGMENT AT LAW—NON-RESIDENCE OF DEBTOR — ATTACHMENT—EQUITABLE INTEREST—GARNISHMENT OF TRUSTEE.

LADD v. JUDSON.

Supreme Court of Illinois, October 24, 1898.

1. A bill in the nature of a creditors' bill to reach equitable assets of a debtor cannot be maintained by a creditor whose demand is purely legal, where a judgment at law has not been obtained in the jurisdiction where the bill is filed.

2. The fact that, because of the non-residence of such debtor, an action at law cannot be maintained against him in such jurisdiction, affords no reason for dispensing with the judgment at law.

3. The rights of a non-resident beneficiary under a will devising property to an executor or trustee within the State, and directing him to sell it, and pay the proceeds to her, constitute an equitable interest in the property in the hands of the executor, within Rev. St. p. 154, ch. 11, § 8, authorizing the levy of a writ of attachment on any land or tenements in and to which a non-resident debtor "has or may claim any equitable interest or title."

4. Where a non-resident debtor is a beneficiary under a will devising property to an executor or trustee within the State, and directing him to sell it, and pay the proceeds to her, the executor may be summoned as garnishee, under Rev. St. ch. 11, § 21, authorizing the sheriff to summon as garnishee persons in his county, whom the creditor shall designate as having any property, effects, choses in action, or credits in his possession or power belonging to defendant.

WILKIN, J.: This is a bill in equity in the nature of a creditors' bill, by appellants, against appellees, filed in the Montgomery circuit court. It alleges that complainants obtained a decree of foreclosure in the circuit court of Josephine county, Oreg., against defendants Thomas P. and Jennie H. Judson, on a note and mortgage executed by them for $1,121.45; that certain mortgaged property was sold under that decree, and the proceeds applied thereon, but was insufficient to fully pay the same, leaving a balance of $981.11; that Solomon Harkey, the father of defendant Jennie H. Judson, died testate, leaving a large amount of real and personal property in Montgomery county, Ill., which he willed to the defendant Alexander A. Cress, as executor, in trust, to sell and convert into money, and then divide the proceeds equally among his several children, including the said Jennie H. Judson; that there is now remaining in the hands of said trustee under said will, and undisposed of, certain real estate described, containing about 320 acres, in Montgomery county, Ill.; that the judgment referred to in this bill was regularly obtained against the defendant in the circuit court of Josephine county, Oreg., personal service having been had upon them, and that the Judsons are insolvent and non-residents of the State of Illinois; that the funds sought to be reached to satisfy this debt are within the jurisdiction of this court; and that there is no way in law by which the said property rights and interests held in trust by the said Alexander A. Cress for the defendant Jennie H. Judson can be reached; and that there is no other property of any kind or character in the State of Illinois, owned by the defendants, which can be reached by attachment or otherwise; and that complainants have no remedy at law. The bill alleges generally, upon information, that the trustee has control of notes, accounts, choses in action, etc., which he holds in trust for the defendants under the terms and conditions of the will aforesaid, and prays discovery; that said T. P. Judson and Jennie H. Judson have refused to pay the amount due the complainants, or to apply thereon the equitable interest which is held in trust for them by the said trustee, all of which is contrary to equity and good conscience; that by reason of said defendants being non-residents of the State of Illinois, and keeping themselves out of the jurisdiction of the courts, complainants have been unable to obtain judgment in Illinois against the Judsons. The bill prays answer not under oath, and especially that the said Alexander A. Cress may be required to inform the court as to the amounts and value of all property, interests, and effects held by himin trust for the use of T. P. Judson and Jennie H. Judson, whereby complainants' debt could be satisfied, and that the Judsons may be decreed to pay to complainants the amount heretofore named, with interest; that the executor or trustee may be required if on hearing he is found to hold real estate for the use of the Judsons, to sell or dispose of it, or so much of it as may be found necessary to satisfy complainants' debt; and that he may turn out other property and property rights toward the payment of the said indebtedness; and that com-

plainants may be declared to have a lien upon all property owned or held by the said Cress in which the Judsons are interested.

A copy of the will making such devise was attached to and made a part of the bill. Item 4 is as follows: "I will and devise to my executor or executors hereinafter named or described all my real estate, including all that devised to my wife for life, but, subject to that devise for life to her, in trust for the following purposes or objects: First, that he may sell said real estate, and convert the same into money; and, as I don't wish my said real estate sacrificed, I hereby authorize and empower my executor or executors to sell the whole or any part or any parcel thereof, and convey the same, when sold, on such terms and at such times as he may deem for the best interest of my estate. He is expressly authorized to use his discretion in selling any and all real estate, and make the sales thereof privately or publicly, as shall seem to him best for my estate. Secondly, the rents and profits of said estate, except so much thereof as shall be necessary to make such repairs as are needful to keep the improved parts of said real estate from deteriorating in value and pay the taxes on my entire real estate, including that in which my wife has a life estate, together with the proceeds of said real estate, shall be devided into seven equal parts,—that is, after the costs and expenses of my said real estate have been paid,—and one-seventh part thereof shall be paid as follows: To my sons William P. Harkey, Jacob M. Harkey, and Solomon S. Harkey; and one-seventh part each to my daughters Sarah C. Wilton and Jennie H. Judson; one-seventh part to my granddaughter Martha J. Blackburn; one-seventh part thereof to the children of my deceased son or the survivor of them, viz.: Ida Harkey and Ella Lee Harkey, one-seventh part thereof." Publication was made as to the defendants Judson, and personal service had on Alexander A. Cress. He appeared, and filed a general and special demurrer to the bill, alleging for special cause that it did not show that the complainants had recovered a judgment at law on their claim. The demurrer was sustained, and, complainants declining to amend, the bill was dismissed at their cost. To reverse that order, they appealed to the appellate court for the Third district; but the decree of the circuit court was affirmed, and they now prosecute this further appeal.

The principal question raised and discussed on this record is whether the failure of complainants below to obtain a judgment at law against the defendants Judson in this State is, on the facts alleged, fatal to their bill. That a judgment at law and execution thereon, with a return of *nulla bona*, are prerequisites to the maintenance of a creditors' bill proper, has never been questioned. Our statute expressly so provides. A bill in the nature of a creditors' bill, the object of which is to remove a fraudulent incumbrance or other obstruction out of the way of a levy and sale under an execution, may be filed immediately upon obtaining judgment. The judgment, is, however, no less essential in such a case than that of a simply creditors' bill. The reason frequently given for requiring such judgment at law in both classes of cases is that to allow a complainant to establish his claim in the first instance in a court of chancery would be to deprive the defendant of the right of trial by jury. It is also well settled that the judgment at law necessary to give the court jurisdiction in such cases must be a judgment in the jurisdiction where the bill is filed. Winslow v. Leland, 128 Ill. 304, 21 N. E. Rep. 588, citing Steere v. Hoagland, 39 Ill. 264.

But counsel for appellants insist that there is a third class of cases in which a creditor may maintain a bill in equity for the satisfaction of his debt,—that is, where he seeks to reach property or funds accessible only by the aid of a court of chancery,—and that in such cases no judgment at law is necessary. Expressions are referred to in some early decisions of this court which give support to this contention. Greenway v. Thomas, 14 Ill. 271; Miller v. Davidson, 3 Gilman, 518; Getzler v. Saroni, 18 Ill. 511. But it has never been decided in this State that the mere fact that assets of a debtor out of which satisfaction is sought can only be reached through a court of equity will give that court jurisdiction, in the absence of a judgment at law; and the uniform holding that, in bills of the second class above mentioned, such a judgment must be averred and proved, is irreconcilable with any such decision. If a case can arise in which relief may be sought in equity in the first instance, it must appear that the complainant's demand is of such an equitable character that it can only be established in a court of chancery; otherwise, the right of the defendant to a trial by jury upon a legal claim would be taken away, and the reason for the rule, as above stated, destroyed. And so we said in Dormueil v. Ward, 108 Ill. 216, where it was insisted that the case came within an exception to the general rule requiring a judgment (page 219): "These so-called exceptions, when properly understood, are rather nominal than real, for a bill of this character will not lie in any case where the claim, as it is here, is a purely legal demand. In all cases where such a bill has been maintained, the claim, of the complainant has had some equitable element in it,—such as a trust, or the like. But, in the absence of some element of this character, there is a want of jurisdiction to adjudicate upon the claim at all; and it is upon this fundamental doctrine the rule controlling this class of cases rests. When, however, a judgment has been obtained, and an execution has been returned *nulla bona*, and it can be shown the defendant has equitable assets which cannot be reached by execution, or that he, or others acting in concert with him, have fraudulently placed obstructions in the way of collecting the claim by execution, a case will then be made out for the interposition of a court of equity. The jurisdiction of the court

thus invoked is known as a part of the auxiliary jurisdiction of a court of equity; but as a condition precedent to its exercise, where the demand is purely legal, as it is here, the claim must be reduced to a judgment and an execution thereon returned *nulla bona*. Such is the settled law of this State, and it is supported by the general current of authority." See, also, Shufeldt v. Boehm, 96 Ill. 560.

If it were true, as alleged in the bill and urged in the argument, that, by reason of the non-residence of the defendants Thomas P. and Jennie H. Judson, an action at law cannot be maintained against them in this State, that fact would furnish no sufficient reason for changing the well-settled rule, uniformly adopted, making a judgment at law necessary. Shufeldt v. Boehm, *supra*. We are not, however, prepared to hold that this bill shows that such a judgment cannot be obtained. If Mrs. Judson's ownership in the property in question, or the proceeds thereof when sold, is such an interest as can be seized by a decree in chancery, and applied in satisfaction of her indebtedness, it is difficult to see why, under our attachment and garnishment laws, an action at law cannot be maintained against her. Cases like Baker v. Copenbarger, 15 Ill. 103; West v. Schnebly, 54 Ill. 523, and Farrar v. Payne, 73 Ill. 82, decided under the law as it existed prior to the passage of the act of March 31, 1869, re-enacted December 23, 1871, and still in force, are not authorities on this question. The present statute authorizes the levy of a writ of attachment upon any lands or tenements in and to which a debtor "has or may claim any equitable interest or title." Rev. St. p. 154, ch. 11, § 8. It would seem clear that Mrs. Judson, on the facts here alleged, "has or may claim" some equitable interest in the property in the hands of the executor of her father's will. But, if she cannot, upon what principle can her creditors attack it? If it be conceded that the property could not be levied upon, still the executor, if he has in his "possession or power" any property, effects, choses in action or credits belonging to Mrs. Judson, may be summoned as garnishee in an action by attachment. *Id.* § 21. In Steib v. Whitehead, 111 Ill. 247, certain real estate was devised to trustees to keep rented, make repairs, etc., and "pay over all remaining rents and income in cash into the hands of my said daughter Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet," and it was held that the net income was not liable to garnishment in the hands of the trustee for debts of the beneficiary, Juliet. The decision was placed upon the sole ground that, by the terms of the devise, it appeared the testator intended to place it beyond the control of his daughter or her creditors while in the hands of the trustees. It is fairly inferable from what is there said that, but for such manifest intention on the part of the testator, the fund would have been the subject of garnishment.

But it will not be necessary to pursue this inquiry further. It may be that upon a full answer in garnishment, involving all the facts and a construction of the will of Solomon Harkey, such an action cannot be maintained; but on the facts here alleged, which are admitted by the demurrer, we see no reason for so holding. Aside from that question, appellants' claim being purely a legal one, they cannot reach Mrs. Judson's property through a court of equity without first obtaining a judgment against her in a court where she may avail herself of a jury trial and all legal defenses which she may have to such claim; and, if it be true that no such judgment can be obtained, then, however great the hardship, they must forego the satisfaction of their debt out of the property sought to be reached by this bill. The judgment of the appellate court will be affirmed. Judgment affirmed.

NOTE.—The strong dissenting opinion of Phillips, J., in the principal case, attests at least the close character of the question involved. Judge Phillips' argument is not without plausibility and is apparently supported by authority. Upon the subject of garnishment of an executor he says that where under a will, lands are devised to an executor to sell, and convert the samein to money, and divide the sum so received therefrom between certain devisees, this is a devise of money, and not of land. Land so devised to the testator, with power of sale, cannot be sold on execution issued on a judgment against one of the devisees, who is to receive a portion of the proceeds thereof. Baker v. Copenbarger, 15 Ill. 103. The devisee has no interest in the land which can be sold under execution, nor can he sell and convey the same so as to effect an absolute conveyance thereof. While all the devisees may elect to take land instead of money, that election can only be made by all the devisees acting in concert, and cannot be made by one or more less than all. Lands in such case devised to an executor, not being liable to sale on execution, is for the same reason not liable to be sold on attachment. The legal title to the land is held in trust by the executor, for the purpose specified in the will to be sold, and the proceeds distributed according to the directions of the will; and the title held by the executor, being strictly in trust with power of sale, is as free from any right or claim of the devisee as if he was to have no interest in the proceeds. The devise in such case is a devise of money, and not of land, and the devise to the devisee was not land, but money; and her only claim of interest was in that money, and in that she has no interest until the land is sold by the executor. Baker v. Copenbarger, *supra*. The principles announced in this case have been frequently recognized and followed by this court. Jennings v. Smith, 29 Ill. 116; Rankin v. Rankin, 36 Ill. 293; Ridgeway v. Underwood, 67 Ill. 419; Germain v. Baltes, 113 Ill. 29; Haward v. Peavey, 128 Ill. 430, 21 N. E. Rep. 503; *In re* Corrington's Estate, 124 Ill. 363, 16 N. E. Rep. 252; Ebey v. Adams, 135 Ill. 80, 25 N. E. Rep. 1013; Strode v. McCormick, 158 Ill. 142, 41 N. E. Rep. 1091.

"In the absence of special statutes," continues Judge Phillips, "it is a well-recognized rule of law that an executor or administrator cannot, in his official capacity, be held liable as garnishee at suit of a creditor of a decedent, or of one who is a legatee or

distributee, or creditor of an estate. The executor derives his authority under the will from the law, and must execute it according to the directions of the will, and in pursuance of rules of law. If executors and administrators were liable to a process of garnishment, the operation and effect of the law with reference to the administration of estates would be substantially destroyed, and the settlement of estates be delayed, disarranged, and rendered complex and involved. No garnishment can be had against an executor or administrator of a distributive share of a devisee to an estate until the court has decreed a distribution of the proceeds in the hands of the administrator. Barnes v. Treat, 7 Mass. 271; Brooks v. Cook, 8 Mass. 247; Thorn v. Woodruff, 5 Ark. 55; Stout v. La Follette, 34 Ind. 365; Colby v. Coates, 6 Cush. 558; Threshing Machine Co. v. Miracle, 54 Wis. 295, 11 N. W. Rep. 580; Thayer v. Tyler, 5 Allen, 94; Welch v. Gurley, 3 N. Car. 510; Young v. Young, 2 Hill (S. Car.), 425; Curling v. Hyde, 10 Mo. 374; Winchell v. Allen, 1 Conn. 385; Lyons' Admr. v. Houston, 2 Har. (Del.) 349; Waite v. Osborne, 11 Me. 185; Wilder v. Bailey, 3 Mass. 289; Marvin v. Hawley, 9 Mo. 382; Hill v. Railway Co., 14 Wis. 291; Dawson v. Holcomb, 1 Ohio, 275; Norton v. Clark, 18 Nev. 247, 2 Pac. Rep. 529; Millison v. Fisk, 43 Ill. 112. Whenever the devisees may maintain an action at law against the executor or administrator to recover the legacy or distributive share of the estate, then, and not till then, can such executor or administrator be garnished by any creditor. Cutter v. Perkins, 47 Me. 557; Post v. Love, 19 Fla. 634; Piper v. Piper, 2 N. H. 439. To allow a distributive share in the estate to be secured by garnishment before that share is ascertained and determined would, in cases where debts have not been paid, lead to absolute uncertainty, and injustice, as it cannot be determined whether there will be a surplus in the hands of the executor or administrator on final settlement; and hence the rule of law is that, until the distributive shares are ascertained, they cannot be secured by garnishment. Richardson v. Lester, 83 Ill. 55; Richards v. Griggs, 16 Mo. 416; Norton v. Clark, *supra*; Hoyt v. Christie, 51 Vt. 48; Harrington v. La Rocque, 13 Oreg. 344, 10 Pac. Rep. 498; *In re* Nerac's Estate, 35 Cal. 392.

In a case where the testator dies, and by his will devises land to an executor in this State with power of sale, and that executor is directed to sell and dispose of the lands, and convert the same into money, and distribute the same among certain devisees, and some of those devisees are non-residents of the State of Illinois, or have absconded from the State, and have no property in this State, except the equitable interests under the will of the testator, there is no method known to the law by which a judgment at law could be recovered. There could be neither attachment, nor garnishment of the interest of a devisee. The statute has provided no means by which the interest could be reached by proceedings *in rem* only, by garnishment. No service could be had on the devisee in such case, so that a judgment at law could be recovered. An absconded or non resident debtor having such equitable interests in property in this State can not escape a liability for a *bona fide* debt, because the law has provided no means by which a judgment at law may be recovered. The creditor may resort to a court of equity, establish his debt, and have satisfaction out of the equitable interest of such absconded or non-resident debtor. It was held in Getzler v. Saroni, 18 Ill. 518: 'And if the property be not subject to attachment at law, being an equitable interest only, and personal service cannot be obtained on his debtor, so that he is without remedy at law for the establishment of his debt, he may, in the first instance, go into equity, establish his debt, and have satisfaction out of the equitable interest.' To the same effect is Russell v. Clark, 7 Cranch, 87. In Steere v. Hoagland, 39 Ill. 264, it was held: 'Where a fund cannot be reached at law, and is only accessible in a court of chancery, then creditors may resort to equity in the first instance. • • • If the claim is to be satisfied out of the fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law.'"

Judge Phillips also contends that to the general rule that there must be judgment and return of execution unsatisfied before resort can be had to a court of equity, there are, and have always been, exceptions in special cases, such as this, where a judgment cannot be obtained because the debtor has absconded or removed from the State, or is a non-resident. As sustaining this doctrine, he cites Scott v. McMillen, 1 Litt. 302; Anderson v. Bradford, 5 J. J. Marsh, 69; Kipper v. Glancey, 2 Blackf. 356; Pendleton v. Perkins, 49 Mo. 565; Peay v. Morrison's Exrs., 10 Grat. 149; Earle v. Grove, 92 Mich. 285, 52 N. W. Rep. 615. In the latter case it was held: "The complainants claim that while the general rule in all the States, statute or no statute, is that there must be judgment and a return of execution unsatisfied before a resort can be had to equity, still, that there are and always have been exceptions to this general rule, in special cases; as where a judgment cannot be obtained because the debtor is dead, or has absconded or removed from the State, or is a non-resident. • • • Here the amended bill avers a judgment regularly obtained upon personal service in New York, and the exhaustion of legal remedies in that State; that Kendall is insolvent and a non-resident of this State; that the fund sought to be reached to satisfy the debt is here within the jurisdiction of the court where the bill has been filed; and that there is no way in law in which to reach such fund. This would be sufficient to maintain the suit if we had no statute, and the statute does not forbid it." The right to relief by a bill in equity without judgment at law, when the debtor has absconded, and there is no remedy except in equity, is recognized in Greenway v. Thomas, 14 Ill. 272. To the same effect is Pope v. Solomon, 36 Ga. 541. In McCartney v. Bostwick, 32 N. Y. 62, it was held with reference to resort to a court of equity without judgment at law: "The rule, of course, presupposes that they have a legal remedy; but, so far as the courts of this State are concerned, they have none. The facts stated by the complainants show that no remedy whatever at law exists in their favor in this State; that no court of law of this State has jurisdiction to entertain a suit to be brought by them against the debtor, either upon a judgment or the original indebtedness, and that it is therefore impossible for them to recover judgment in this State, and have their execution returned. Does equity demand that the legal remedy shall be exhausted where none exists, before it will enforce a trust created by statute, of which it alone has jurisdiction?"

"In this case," concludes Judge Phillips, "there is no possible manner in which a judgment may be recovered at law, and no satisfaction can be had by garnishment. A non-resident debtor having large equitable interests as a devisee of an estate cannot be reached in the proceedings at law, and recourse may be had to

equity as the only jurisdiction that can protect the interests of the court, and make the property liable for the debts of this devisee. The remedy in equity is full and complete, and it was error to sustain the demurrer to the bill, as it was also error in the appellate court to affirm the same. Because the right of garnishment did not exist as against administrators and executors, the legislature, by an act entitled 'An act in relation to the garnishment of administrators,' approved June 11, 1897, in force July 1, 1897 (Laws Ill. 1897, p. 231), endeavored to remedy the difficulties arising from the want of power of a creditor to garnish such administrators and executors with respect to land, money, goods, etc., belonging to any heir or distributee of an estate, but providing no final judgment should be rendered against such administrator or executor until after an order of distribution had been made. This statute, however, was enacted long after the commencement of this suit, and can have no effect on the questions presented on this record."

The following are some recent cases on the subject of the necessity of obtaining judgment at law before equity will interpose at the suit of a creditor. It will be found that the cases on the subject are not by any means harmonious. A conveyance of land from one joint debtor to another will not be set aside on a creditors' bill before judgment is obtained, which would be a lien thereon. Guggenheimer v. Lockridge (W. Va.), 19 S. E. Rep. 874. A creditors' bill cannot be maintained by one who has neither obtained a judgment, nor shown any reason for not doing so. Streight v. Junk (C. C. A.), 59 Fed. Rep. 321. To entitle one to maintain a bill under the statutes giving a remedy in equity against property of a debtor which cannot be attached or taken on execution at law, the claim need not be reduced to judgment. Sanford v. Soule Piano & Organ Inv. Co. (Mass.), 41 N. E. Rep. 120. A creditor whose claim has not been reduced to judgment, and who has no lien or claim under a trust, cannot maintain a creditors' bill. Putney v. Whitmire (C. C.), 66 Fed. Rep. 385. Under Rev. St. 1893, ch. 81, sec. 22, which makes void all preferences and confessions of judgments by limited partnerships, a creditor of a limited partnership which has confessed judgment may, without first obtaining judgment at law, file a bill to have such confession of judgment set aside, and the partnership assets applied *pro rata* to all the firm debts. Crouch v. First Fat. Bank (Ill. Sup.), 40 N. E. Rep. 974. In order that a party may maintain either an original creditors' bill, or a cross bill in the nature of such a bill, his demand must have been reduced to judgment. Goff v. Kelly (C. C.), 74 Fed. Rep. 327. In the absence of fraud, a simple contract creditor cannot subject an equity of redemption to sale until he has acquired a lien thereon. Johnson v. Riley (W. Va.), 23 S. E. Rep. 698. A creditors' bill must be preceded by a judgment at law. Childs v. N. B. Carlstein Co. (C. C.), 76 Fed. Rep. 86. Under chapter 740, Laws N. Y. 1894, providing that a creditor of a deceased insolvent debtor, having a claim over $100, may disaffirm, treat as void, and resist all acts done and conveyances made in fraud of creditors by such debtor, and may maintain an action for the purpose, though no judgment has been obtained, a foreign creditor of a deceased debtor may maintain an action in a federal court in New York to set aside transfers made by him, though no judgment has been obtained in New York and no administration has been taken out there. Lillienthal v. Drucklieb (C. C.), 80 Fed. Rep. 562. A creditor whose claim has not been reduced to judgment cannot maintain an action in equity to enforce his legal demand, and a bill will not be entertained in aid of an attachment on the ground that the debtor has absconded, or left the State, and cannot be served with process. Detroit Copper & Brass Rolling Mills v. Ledwidge, 162 Ill, 305, 44 N. E. Rep. 751. A bill will not lie to subject equitable assets to the payment of a claim which has not been reduced to judgment, and which is against a resident. Jenks v. Horton (Mich.), 72 N. W. Rep. 20. Where a creditors' bill contains such allegations of fact that the court can see that there is no remedy at law, or that such remedy is wholly inadequate, or shows that the creditor claims a trust in his favor, and that the relief can only be made available in a court of chancery, the court will not require him in the first instance to obtain an empty judgment and fruitless execution, as a condition precedent to entertaining his bill. Early Times Distillery Co. v. Zeiger (N. Mex.), 49 Pac. Rep. 723.

JETSAM AND FLOTSAM.

CHRISTIAN SCIENTISTS AND THE LAW.

The so-called Christian Scientists, who appear to have been responsible for the death of Harold Frederic, the late London correspondent of the New York *Times*, have been indicted on a charge of manslaughter by the London coroner's jury which has been investigating the case. There is reason to hope that this prompt and vigorous action may lead to the treatment of this class of fanatics as they deserve. It would be a monstrous thing if any and every mountebank or "crank" could, by calling himself a "Christian Scientist," thus avoid responsibility and shield himself from the consequences of his acts. Thorough investigation by the coroner has shown that the life of this brilliant *litterateur* could probably have been saved but for the fatal influence of these peculiar people, who, ignoring all the accumulated experience of past ages, refuse to take even ordinary precautions against the fatal progress of disease either in the patient himself or in the people around him—as, for example, in the case of the development of smallpox—and seek a cure either by anointing with oil, or relying upon prayer. It is time that all mere sentiment was brushed aside, and the conduct of these peculiar pestilential people viewed in its proper light. It is true that the law governing this class of cases is not well settled, but the case of Harold Frederic will undoubtedly do much toward establishing an important precedent. In 58 Albany Law Journal, 232, reference is made to a case directly in point, that of Reg. v. Cook and Cook, which was tried in the London Sessions before Darling, J., on September 16th, last, and wherein the jury found that there was gross negligence on the part of the parents of the 14-months old child, seriously ill with whooping cough, in refusing to call in medical aid. These so-called "Peculiar People" announced themselves absolutely opposed to the practice of medicine, and refused to have their suffering child treated, relying upon prayer and anointing with oil. Whether or not, in the case of a fractured limb, they would refuse to set the injured member and otherwise treat the wound in accordance with the principles of modern surgery, is not yet settled perhaps, by their own conclave, but such action would hardly be more surprising or fatalistic in its character than their course toward the practice of medicine. In this case Darling, J., charged the jury that if the defendants neglected the duty which the law imposed upon them—the duty of call-

ing in medical aid for the child—and death was thereby caused or accelerated, they were guilty of the charge made against them. The jury, while finding that there was gross neglect, were unable to agree as to whether that neglect accelerated death. It is true that in this case the child was of tender years and unable to choose for itself, the law, therefore, protecting it; and the question would arise whether a person of mature years and sound discretion would not be free to have his case treated in any manner he saw fit, provided, of course, there were no danger to the public from such treatment or lack of treatment. It would not be surprising if, in the modern development of the law governing this peculiar class of cases, it were held that victims will not be permitted to place themselves in the hands of these Scientists. If it be a crime for one to commit suicide—and the law of New York says it is—trusting to Christian Science in critical illness, or in the case of mangled bones and tissues may be, as a contemporary pertinently suggests, only a species of slow suicide, and, therefore, properly preventable by law. Several recent adjudications on this subject possess interest for the profession. The Supreme Court of Rhode Island, in the case of State v. Mylod, 40 Atl. Rep. 753, held that the practice of Christian Science, consisting of prayer for Divine assistance, the encouragement and direction of the thoughts of the patient, without recommending or administering any drug or medicine, or giving him any course of physical treatment, is not a violation of a State statute prohibiting the practice of medicine or surgery in any of its branches without a certificate from the State board of health. Bosworth, J., speaks of the defendant as a "person who does not know, or pretend to know, anything about disease or about the method of ascertaining the presence or the nature of disease, or about the nature, preparation or use of drugs or remedies, and who never administers them." Hence the court came to the conclusion that the mere teaching of the doctrine that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look upon the bright side of life does not constitute the practice of medicine in the popular sense. On the other hand, in the case of Application of the First Church of Christ Scientist, 6 Pa. Dist. 745 (1897), Pennypacker, J., refused the application for a church charter on the ground that the organization was attempting not merely to inculcate a creed or promulgate a form of worship, but to establish a prescribed method of practicing the art of healing the diseases of the body, and the latter purpose was held to be contrary to the policy of the commonwealth, as expressed in the Act of March 24, 1877, P. L. 42, which makes it a misdemeanor to announce one's self as a "practitioner of medicine, surgery, or obstetrics, or to practice the same" without a diploma from a chartered medical school duly authorized to confer the degree of doctor of medicine. Another interesting case in point is that of State v. Buswell, 40 Neb. 158 (1894), in which it was held that the practice of Christian Science, although not a practice of medicine as those terms are usually understood, is a violation of law, for the reason that it is a treatment for physical or moral ailments, which is included in the practice of medicine by the express words of the statute.—*Albany Law Journal.*

CORRESPONDENCE.

SUPPLEMENTARY PROCEEDINGS—SEIZURE OF JEWELRY.

To the Editor of the Central Law Journal:

In the article on "Supplementary Proceedings—What Liable to Seizure—Wearing Apparel," 47 Cent. L. J. 405, I believe an erroneous impression is left as to the law of Missouri in conveying the idea that money of a debtor can be extracted from his pocket, or jewelry removed from his person. The writer of the article, in speaking of the power of a court to appoint a receiver to whom the debtor must turn over the above mentioned property, says: "This is the ultimatum of the proceeding in every jurisdiction, and is its effective sanction." The only Missouri case cited is State v. Barclay, 86 Mo. 55, wherein, on page 58, the court says: "The statute in question does not go so far as to authorize the court to make an order on the debtor to turn over property to the officer, as is the law in many States." If the writer of the article did not intend to convey the above impression, certainly he did not point out this distinction in the rule in Missouri.

WILLI BROWN.

A LEARNED ATTORNEY.

To the Editor of the Central Law Journal:

A bank in our city was sued on a certificate of deposit, which had been paid by the bank on an alleged forged indorsement. The bank won the suit. The attorney of the unsuccessful suitor advised him to appeal, using the following language in his letter of advice: "The basis of the appeal ought to be made on error on findings of the jury contrary to the law and evidence. And also, specifically, upon the ground that the court erred in admitting testimony, over objections of estoppel, showing that the indorsement on the certificate was made by the plaintiff, B, when it was '*prima facia*' that forgery was committed, and that 'patent ambiguity' ensued, preventing the defendant from showing that the indorsement was made by the plaintiff by his mark." What does this attorney mean? The above quotation is contained *verbatim* from a letter written seriously by an alleged attorney in Topeka, Kansas.

X.

HUMORS OF THE LAW.

"I hear you had an action brought against you by a man who broke his collar-bone on your door-step. How did the case go?" "Met the same fate as he did." "How do you mean?" "Slipped upon appeal!"

Judge—"You say the defendant turned and whistled to the dog. What followed?" Intelligent Witness—"The dog."

Judge Breckinridge, in reprimanding a criminal, among other hard names called him a scoundrel. The prisoner replied: "Sir, I am not as great a scoundrel as your honor—takes me to be." "Put your words closer together," replied the judge.

Lawyer—"Do you live with your husband?" Witness—"No, sir." Lawyer—"Are you divorced?" Witness—"I don't know." Lawyer—"Eh? What's that? You don't know?" Witness—"Certainly not. My husband never takes me into his confidence."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCORD AND SATISFACTION—Compromise—Unliquidated Claim.—Plaintiff's claim is an unliquidated one, so as to be the subject of compromise, though the dispute is only as to whether damages to fire and sprinkling plugs was caused by it, where it did street sprinkling for defendant city under a contract that it should receive a certain amount therefor, but that from such sum there should be deducted any damages to the fire and sprinkling plugs caused by it.—H. C. POLLMAN & BROS. COAL & SPRINKLING CO. v. CITY OF ST. LOUIS, Mo., 47 S. W. Rep. 563.

2. ADMINISTRATION — Executors — Expenses.—Hill's Ann. Laws, § 1188, authorizing an executor to retain expenses of administration in preference to any claim or charge against testator's estate, does not give him a lien for such expenses prior to a mortgage on testator's land, though the other property is not sufficient to pay such expenses.—SHEPARD v. SALTZMAN, Oreg., 54 Pac. Rep. 882.

3. APPEAL—Freehold Involved.—An action against a trustee under a will, to require him to account for certain securities belonging to the trust fund, and to restore thereto the amount of wasted securities, does not involve a freehold, though the trustee held title to land under the foreclosure of a mortgage forming part of the trust fund, and the decree, which found that there had been a breach of trust, and removed him, ordered him to convey the land to his successor in trust; it appearing that he did not claim title to the land, except as trustee.—NEVITT v. WOODBURN, Ill., 51 N. E. Rep. 593.

4. APPEAL—Petition in Error—Amendment.—A petition in error which is fatally defective, by reason of an entire failure to state any cause for reversal of the judgment complained of, cannot be amended more than one year after the rendition of such judgment, but must be dismissed.—NOWLAND v. CITY OF HORACE, Kan., 54 Pac. Rep. 919.

5. APPEAL—Record.—There can be no review where it appears that there were filed at least two amended complaints, with reference to which various rulings were made, but the one on which trial was had is unidentified, though accompanying the transcript are two documents purporting to be amended complaints, which do not show the time or order of their filing.—MARSH v. BOWER, Ind., 51 N. E. Rep. 480.

6. ASSUMPSIT—Money Obtained by Fraud.—An action may be maintained to recover back money obtained by fraud and under circumstances which, in equity and conscience, require that it should be repaid.—KRUMP v. FIRST STATE BANK OF HANKINSON, N. Dak., 76 N. W. Rep. 995.

7. ATTACHMENT—Claim to Attached Property.—The fact that an indemnifying bond was executed to the sheriff before the levy of an attachment does not preclude claimants of the property from asserting their claims, as provided by Civ. Code, § 29.—GEVEDON v. BRANHAM, Ky., 47 S. W. Rep. 589.

8. ATTACHMENT—Sufficiency of Affidavit.—Under the statutes of New York, an affidavit sworn to on the same date the complaint was verified, and averring that plaintiff has performed labor and services for defendant from a time stated "down to the present time," does not show a breach of contract or a cause of action accrued which will support an attachment.—LAUGHLIN v. QUEEN CITY CONST. CO., U. S. C. C., N. D. (N. Y.), 89 Fed. Rep. 482.

9. ATTORNEY AND CLIENT—Actions for Services.—Where attorneys were to receive no pay for their services in conducting an action until a judgment was obtained and the case settled, an action for their services, commenced after the settlement of the case, and after a check for the amount thereof was given to them, to be paid to their client, and after a dispute had arisen over the amount of their claim for services, and they had employed other attorneys to obtain the money, was not prematurely brought.—WALBRIDGE v. BARRETT, Mich., 76 N. W. Rep. 978.

10. BANKRUPT LAW—Effect on Local Insolvency Proceedings.—Since the United States bankruptcy law (Act July 1, 1898) declares that the act should go into full force and effect on its passage, and saves only proceedings commenced under State insolvency laws before the passage of the act from being affected by it, it supersedes all State insolvent laws from the date of its passage.—PARMENTER MFG. CO. v. HAMILTON, Mass., 51 N. E. Rep. 529.

11. BILLS AND NOTES—Indorsement by Corporation.—An indorsement of a note by a corporation in due course of business, and for its benefit, although not strictly in accordance with its by-laws, is binding upon it.—FIRST NAT. BANK OF WASHINGTON v. EUREKA LUMBER CO., N. Car., 31 S. E. Rep. 348.

12. BILLS AND NOTES—Possession—Ownership.—The possession of unindorsed negotiable notes is *prima facie* evidence of ownership in the holder.—MARTIN v. MARTIN, Ill., 51 N. E. Rep. 694.

13. BILLS AND NOTES—Payment of Drafts—Forged Instruments.—A holder of a draft under a forged instrument of the payee cannot compel the drawee to pay the same, since such holder, although he may have received the draft in good faith and for value, acquired no title thereto.—BEATTIE v. NAT. BANK OF ILLINOIS, Ill., 51 N. E. Rep. 602.

14. BUILDING AND LOAN ASSOCIATIONS—Pleading.—In an action by a building and loan association on a note and mortgage of a member, a plea admitting their execution, and that plaintiff issued stock to defendant, on which certain payments have been made, and praying to have such stock canceled, and the amount of the payments, with interest, applied on such loan, is bad as a counterclaim, as it does not state facts on which defendant would be entitled to maintain an independent action.—NO. 2 INDIANA MUT. BUILDING & LOAN ASSN. v. CRAWLEY, Ind., 51 N. E. Rep. 466.

15. CARRIERS—Passengers—Negligence.—A passenger proving that he was injured through the negligence of a brakeman, conductor or engineer, may recover with-

out proving which one was negligent.—POMEROY V. BOSTON & M. R. R., Mass., 51 N. E. Rep. 523.

16. CARRIERS—Passenger—Negligence.—To authorize a recovery against a railroad company for failure to rescue a passenger who has fallen from its train without fault on its part, it must be alleged in the petition that the train could have been stopped, and the time taken to rescue the injured passenger, without running the risk of collision with other trains, or that there were some means by which the trainmen could have procured others to render the necessary assistance.—REED V. LOUISVILLE & N. R. CO., Ky., 47 S. W. Rep. 591.

17. CARRIERS OF GOODS—Liability of Connecting Carrier.—Though a shipment is made under a through contract of affreightment, the connecting carrier is not liable for damages to the shipment caused wholly by the negligence of the initial carrier, in the absence of proof of any agreement of association or partnership, or of authority on the part of the initial carrier to bind the connecting carrier by contract.—TRUMBULL V. COULSON, Colo., 54 Pac. Rep. 915.

18. CHATTEL MORTGAGES—Irregular Foreclosures.—A valid chattel mortgage is not extinguished by an irregular foreclosure sale, but the purchaser succeeds to the rights of the mortgagee.—KELSEY V. MING, Mich., 76 N. W. Rep. 981.

19. CONSTITUTIONAL LAW—Newly-organized County—Officers.—Section 4, of article 11, of the constitution requires county officers to be ordinarily and usually elected by the people, and the legislature cannot provide for passing by a general election, and allowing appointed officers to hold over to the next succeeding election, unless there is some substantial reason therefor.—SPENCER V. GRIFFITH, Minn., 76 N. W. Rep. 1018.

20. CONTRACTS — Entirety—Time.—A contract was conditioned that if the first parties failed to secure a manufacturing plant it was to be void, and all moneys paid thereunder by the second parties (which were to be paid on certain dates) were to be refunded to them, the "location to be secured within 60 days, time to be of the essence thereof." Held, that time was not of the essence of the payments, but of the location.—KING V. RADEKE, Ill., 51 N. E. Rep. 699.

21. CONTRACT—Option Contract — Mutuality.—An option contract to sell a farm, signed only by the owner of the land, is enforceable when accepted within the specified time though previous to such acceptance a unilateral contract.—GUYER V. WARREN, Ill., 51 N. E. Rep. 580.

22. CONTRACTS—Reformation — Boundaries.—Where parties agree that a certain line, which both suppose is the correct one, shall be the dividing line between lands, which line is afterwards discovered not to be the true line, a court of equity cannot reform the contract, since it cannot decide what the parties would have agreed to if they had known the true line.—PHILLIP ZORN BREWING CO. V. MALOTT, Ind., 51 N. E. Rep. 472.

23. CORPORATIONS — Action by Members.—The rule that a corporation, by its officers, is the proper party to maintain an action to protect its property and enforce its rights, and that, until the corporation refuses or is unable, individual members have no right to litigate for it, has no application where it appears from the complaint that the officers of the corporation are engaged in perpetrating a fraud upon its members, and grossly mismanaging the corporate affairs. Under such circumstances, members of the corporation can maintain an action against it and its officers.—PENCILLE V. STATE FARMERS' MUT. HAIL INS. CO. OF WASECA, Minn., 76 N. W. Rep. 1026.

24. CORPORATIONS — Assessment and Sale of Mining Stock.—A forfeiture of shares of stock, where the forfeiture was irregular or defective in form, is not void, but voidable, and, by subsequent knowledge and acquiescence, the shareholder and the company are alike estopped to deny its validity.—RAHT V. SEVIER MINING & MILLING CO., Utah, 54 Pac. Rep. 889.

25. CORPORATIONS—Contracts by Managing Officers—Validity.—The president of a New York corporation owning mines in Idaho, who was authorized by the by-laws to sign obligations of the company, with another stockholder, the two owning nearly all the stock, took full charge and management of the business in Idaho, which they conducted for four years, during which time no meeting of either directors or stockholders was held. During his management the president at different times executed notes, in the name of the corporation, which were paid without objection. Held, that notes so executed to a bank for borrowed money, which was placed to the credit of the corporation, and drawn out upon its checks, which notes were recognized by the successors in interest of the managers for two years, during which time payments were made thereon, were valid and binding obligations of the corporation.—FIRST NAT. BANK OF HAILEY V. G. V. B. MIN. CO., U. S. C. C., D. (Idaho), 89 Fed. Rep. 439.

26. CORPORATIONS—Insolvency—Preferences.—A *bona fide* creditor of an insolvent corporation whose debt was created while the corporation was solvent may receive a preference notwithstanding the debt was guaranteed by a director.—ROCKFORD WHOLESALE GROCERY CO. V. STANDARD GROCERY & MEAT CO., Ill., 51 N. E. Rep. 642.

27. CORPORATIONS — Liability of Subscribers.—One subscribing for stock on condition that he shall receive a paid-up interest in exchange for stock in another concern was not liable for debts of the corporation, where it was never legally organized, though he was present at the first meeting of stockholders, signed the charter, and was made a director.—COLE V. GREAT BEND LAND & LOT CO., Kan., 54 Pac. Rep. 920.

28. CORPORATIONS — Stockholders of Foreign Corporation.—The constitution of Kansas contains the general provision that stockholders shall be liable to creditors of a corporation for an additional amount equal to their stock. Gen. St. Kan. par. 1192, provides, among other things, that each stockholder shall be liable to each creditor whose execution has been returned *nulla bona*. Held, that the statute does not merely provide a remedy for the enforcement of rights created by the constitution, but creates substantive rights, which may be enforced in other jurisdictions in accordance with the forms of remedy there provided.—DEXTER V. EDMANDS, U. S. C. C., D. (Mass.), 89 Fed. Rep. 467.

29. CORPORATIONS—Venue — Action against Foreign Insurance Company.—A foreign insurance corporation, although it has complied with all the provisions and conditions of the statute as to its right to do business in this State, may be sued in any county in the State which the plaintiff designates in his complaint.—EICKHOFF V. FIDELITY & CASUALTY CO. OF NEW YORK, Minn., 76 N. W. Rep. 1030.

30. COUNTY COMMISSIONERS — Exercise of Judicial Functions.—Where a board of county commissioners, in pursuance of Pol. Code, §§ 4157, 4158, decides whether a petition presented to them for the submission of the removal of the county seat to the electors of the county is signed by a sufficient number to require them to submit the question to an election, it exercises judicial functions, within the meaning of Code Civ. Proc. § 1941, providing that a writ of review may be granted when an inferior board, exercising judicial functions, has exceeded its jurisdiction.—STATE V. BOARD OF COMRS. OF RAVALLI COUNTY, Mont., 54 Pac. Rep. 989.

31. CRIMINAL LAW—Assault—Evidence.—The pointing of a revolver, which is not loaded, in a threatening manner, at another, is an assault when the party at whom it is pointed does not know that it is not loaded, or has no reason to believe that it is not, and is, by the act of the menacing party, put in fear of bodily harm.—STATE V. ARCHER, Kan., 54 Pac. Rep. 927.

32. DEED—Cancellation—Failure of Consideration.—Where father and mother deeded to their son their

homestead in consideration of his furnishing them a home and support during their respective lives, but he did not keep the agreement, and treated them with such unkindness as to force them to leave their home, equity will set aside the deed.—McCLELLAND v. McCLELLAND, Ill., 51 N. E. Rep. 559.

33. DEED — Delivery — Acceptance.—Intending to make a gift effective at his death, a father made a deed to his son, without the latter's knowledge, and retained possession. He then concluded to make the gift by devise, but was unable to make a will. During the father's life, the son obtained possession of the deed without his knowledge. Held, no delivery.—LUNDY v. MASON, Ill., 51 N. E. Rep. 614.

34. DEEDS—Evidence.—Where one seeking to secure the admission of record of deeds testified that he did not have the originals, that they were not in his hands, and that with one exception they never had been, and that the deed excepted was not in his possession or control, and that none of the deeds were destroyed, so far as he knew, it is insufficient, under 1 Starr & C. Ann. St. (2d Ed.) p. 955, § 86, providing that where a party testifies that the original of a deed is lost, or not in the party's power to use on the trial, and that, to the best of his knowledge, it was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original, the record of such deed is admissible.—SCOTT v. BASSETT, Ill., 51 N. E. Rep. 577.

35. DEEDS—Execution in Blank.—A deed executed in blank as to the grantee confers authority on the real grantee to contract for the sale of lands, and to fill in his own grantee's name.—LOGAN v. MILLER, Iowa, 76 N. W. Rep. 1005.

36. DEEDS — Mortgages — Evidence.—On an issue whether an instrument was intended as a mortgage or a conditional deed, evidence is admissible that the property was worth, at the execution of the deed, nearly double the consideration named in the deed.—TEMPLE NAT. BANK v. WARNER, Tex., 47 S. W. Rep. 515.

37. DEED—Setting Aside — Complaint.—Complaint to set aside a deed alleged to have been obtained by fraud must show that the consideration was not sufficient, and an offer to restore the same.—SRADER v. SRADER, Ind., 51 N. E. Rep. 479.

38. EASEMENTS—Creation.—Where the owner of opposite tracts of land abutting a street conveyed one, with the privilege of using a spring on the other, it creates an easement in fee for the benefit of the tract conveyed.—BLOOD v. MILLARD, Mass., 51 N. E. Rep. 527.

39. EASEMENTS—Drains.—A license acquired under Laws 1889, p. 116, § 4, making a license to construct a drain upon the lands of another irrevocable if not revoked within one year, vests in the licensee a perpetual easement.—WESSELS v. COLEBANK, Ill., 51 N. E. Rep. 639.

40. ELECTIONS—Secretary of State—Ministerial Duties.—Under the provisions of the statutes of this State, the duties of the secretary of state, in certifying the names of the legislative nominees to the auditors of the proper county, are ministerial, and not judicial.—STATE v. FALLEY, N. Dak., 76 N. W. Rep. 996.

41. ESTOPPEL.—Where a railroad company went into possession under a deed given in consideration of its agreement to erect a switch and execute a written agreement to maintain it, and, in an action to evict it for failure to build the switch and execute the agreement, pleaded title under the deed, and sought equitable relief, it was estopped from pleading limitations to a count for damages for failure to perform the consideration and erect the switch.—SAN ANTONIO & A. P. RY. CO. v. GURLEY, Tex., 47 S. W. Rep. 513.

42. EVIDENCE—Chattel Mortgages.—In replevin for articles claimed under a mortgage covering a jeweler's stock of goods by a general description, including merchandise, furniture and fixtures, where the defense is that the articles named were not included therein, evidence of jewelers and dealers in jewelry, watches, etc., as to how these articles are regarded by the trade in relation to the business, is admissible.—BRODY v. CHITTENDEN, Iowa, 76 N. W. Rep. 1009.

43. EVIDENCE—Notes—Payment.—Defendant having offered in evidence receipts for certain payments dated subsequent to, and claimed to be on account of, the note given, no other debts being proven, the burden of proof thereupon shifted to plaintiff, to show that said payments were on some other account than the note aforesaid.—BYERTS v. ROBINSON, N. Mex., 54 Pac. Rep. 932.

44. EVIDENCE — Parol Evidence — Consideration of Deed.—Parol evidence is not admissible to show that a deed purporting to be based on a "good" consideration, and executed for a specified purpose, was in fact based on a "valuable" consideration, and executed for an entirely different purpose, where no fraud is alleged.—LATIMER v. LATIMER, S. Car., 31 S. E. Rep. 304.

45. EXECUTION—Judgment — Partnership.—A sheriff holding an execution against an individual member of a firm must levy on firm property subject to other executions against the firm, though the records of the case show that the judgment on which such execution was issued was rendered on a note executed by the firm.—SWAN v. GILBERT, Ill., 51 N. E. Rep. 604.

46. EXECUTION PURCHASER—Notice—Prior Equities.—The title to certain land appeared by the records to be in the judgment debtor at the time the judgment was fixed as a lien on the land. The judgment creditor had no notice until the execution sale of the rights of plaintiff, who had advanced to the debtor the money to purchase the land, with the understanding that the profits of a resale should be divided between the parties after plaintiff should be reimbursed for his advance with interest. Prior to the fixing of the judgment lien the land had been conveyed to plaintiff by an unrecorded deed. Held that, though the unrecorded deed was void as against the execution purchaser, yet plaintiff's equity as *cestui que trust* is superior to the rights of the execution purchaser.—JOHN B. HOOD CAMP CONFEDERATE VETERANS v. DE CORDOVA, Tex., 47 S. W. Rep. 522.

47. FRAUDULENT CONVEYANCES—Chattel Mortgages.—A creditor accepting a mortgage from his debtor as a substitute for a bill of sale previously given to secure the debt, and under which he had possession, is estopped to assert, as against other creditors, that his possession continued under the mortgage, which recites that the mortgagor is possessed of the property.—SECOND NAT. BANK OF MONMOUTH v. GILBERT, Ill., 51 N. E. Rep. 584.

48. FRAUDULENT CONVEYANCES—Mortgages.—A creditor who has levied an attachment on the stock of goods of the debtor, having an adequate legal remedy, cannot maintain an action to have a mortgage and a general assignment of the goods set aside.—BAILEY v. AMERICAN NAT. BANK OF DENVER, Colo., 54 Pac. Rep. 912.

49. GARNISHMENT — Indebtedness—Instructions.—In garnishment proceedings, a refusal to instruct that, if the garnishee held property of the principal defendant by a conveyance void as to creditors, the garnishee may be adjudged liable on account of such property or the value thereof, though the principal defendant could not have maintained an action therefor against him, was not error, where the court instructed that if the conveyance was not for the purpose of securing a *bona fide* indebtedness, but was to hinder and defraud creditors, it would be void, and no title could pass under it, but if executed for the purpose of securing a *bona fide* indebtedness it would not be fraudulent, though in effect hindering and defrauding creditors.—SLOMAN v. GOEBEL BREWING CO., Mich., 76 N. W. Rep. 975.

50. GARNISHMENT—Parties.—A judgment creditor of two joint judgment debtors cannot maintain garnishment for a debt due to one of such debtors.—CHICAGO & N. W. RY. CO. v. SCOTT, Ill., 51 N. E. Rep. 580.

51. HABEAS CORPUS—Former Jeopardy.—*Habeas corpus* cannot be resorted to for the purpose of discharging a prisoner on the ground of former jeopardy.—EX PARTE CROFFORD, Tex., 47 S. W. Rep. 583.

52. HIGHWAY—Railroad Right of Way—Adverse User.—A highway may be acquired by adverse user on a railroad right of way parallel with the railroad.—BLUMENTHAL V. STATE, Ind., 51 N. E. Rep. 496.

53. HOMESTEAD.—One cannot at the same time have an urban and a rural homestead.—LAUCHEIMER V. SAUNDERS, Tex., 47 S. W. Rep. 543.

54. HOMESTEAD—Abandonment.—A shoemaker was elected county treasurer, and performed his official duties at the court house, but never entirely abandoned his trade as shoemaker, and intended to resume it, and occasionally occupied his shop to repair shoes. Held, that his election to office did not operate as an abandonment of his business, and a judgment that he had not abandoned his right of exemption in the shop was not unauthorized.—SCHOELLKOPF V. CAMERON, Tex., 47 S. W. Rep. 548.

55. HOMESTEAD—Conveyance — Joinder of Wife.—A conveyance by a husband of his homestead without the joinder of his wife therein, is ineffectual to pass the title thereto, and the estate remains in the grantor, unaffected by the conveyance, and is to be treated as though it were never made.—GRAY V. SCHOFIELD, Ill., 51 N. E. Rep. 684.

56. INJUNCTION—Collection of Note—Release of Surety.—Where a surety on a note, which on its face shows him liable as principal, is released by an extension to the real principal and by neglect to give notice of nonpayment, his remedy is by bill to enjoin its collection, since he cannot establish his suretyship as a defense in an action at law on the note.—GRIER V. FLITCRAFT, N. J., 41 Atl. Rep. 425.

57. INJUNCTION—Complainant must Come with Clean Hands.—A corporation complainant has no standing in a court of equity to obtain an injunction restraining a postmaster from enforcing a fraud order issued against it by the postmaster general, where the grounds alleged in its bill are that it is extensively engaged in a business which it conducts largely through the mails, and for which purpose it desires their use, and where, by the proofs, such business is shown to be one for which the postal system cannot lawfully be used under the laws of congress.—FAIRFIELD FLORAL CO. V. BRADBURY, U. S. C. C., D. (Me.), 89 Fed. Rep. 393.

58. INSURANCE—Limitation of Action — Estoppel.—A court will not enforce the short private limitation fixed by an insurance policy for the bringing of an action thereon, where there was at no time a denial of liability, and the delay resulted from the expectation of the insured, induced by the insurer, that the loss would be paid without suit as soon as funds could be provided.—ALTEN V. MCFALL, U. S. C. C., N. D. (N. Y.), 89 Fed. Rep. 463.

59. INJUNCTION—Proceedings for Violation.—Defendant was enjoined from withdrawing water from a stream to prevent a certain quantity from reaching the dam of plaintiff below. Defendant afterwards purchased the right of another user above, returning the water so acquired to the stream, and withdrew a quantity at his own dam, in violation of the terms of the injunction. Held that, without considering the question of priority between the right purchased and plaintiff's right, defendant was not relieved of contempt because, in his judgment, he had increased the volume of the stream at his dam, by the water returned, by the amount equal to the quantity withdrawn, where the evidence failed to sustain such claim.—RODGERS V. PITT, U. S. C. C., D. (Nev.), 89 Fed. Rep. 424.

60. INJUNCTION — Sale on Execution.—The owner of land is entitled to injunction against one who is proceeding, against right and justice, to have it sold on execution as the property of another.—NATALIE ANTHRACITE COAL CO. V. RYON, Penn., 41 Atl. Rep. 462.

61. INJUNCTION — Temporary Restraining Order.—A restraining order, in anticipation of a hearing of a motion for an injunction, should not be granted except upon the moral certainty of an irreparable injury if it be refused, nor should it be continued when it is made to appear that such a result is not imminent.—RYAN V. SEABOARD & R. R. CO., U. S. C. C., E. D. (Va.), 89 Fed. Rep. 385.

62. INSURANCE—"Mortgagee Clause" — Construction of Conditions.—Conditions, in an insurance policy, limiting the time within which proof of loss must be made and action brought, are applicable solely to the owner of the property insured, as distinguished from the mortgagee, where such conditions are contained in the body of the policy, but are not set out in the "mortgagee clause" attached thereto, and are preceded by a clause providing that "if, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating so such interest as shall be written upon, attached, or appended thereto."—QUEEN INS. CO. V. DEARBORN SAVINGS, LOAN & BUILDING ASSN., Ill., 51 N. E. Rep. 717.

63. JUDGMENT — Confession of Judgment.—Where a warrant of attorney to confess judgment on a note by its terms waives all errors in any proceeding for the confession of a judgment, and agrees that no writ of error shall be prosecuted on the judgment, the defendants, after confession by the attorney, cannot object that the note did not show an assignment to the plaintiff, and that the power of attorney did not authorize the confession.—BOYLES V. CHYTRAUS, Ill., 51 N. E. Rep. 563.

64. JUSTICE OF PEACE—Authority to Grant New Trial.—The authority of a justice of the peace to grant a new trial is limited by the terms of section 6560, Rev. St., by which it is conferred, and an order made by him for that purpose more than five days after verdict and judgment is void.—DERBY V. HEATH, Ohio, 51 N. E. Rep. 547.

65. LANDLORD AND TENANT — Lease — Insolvency.—Where an insolvent banking corporation is proceeded against under the provisions of Gen. St. 1894, ch. 76, § 5900, and the obligations of its executory contract of leasing for a term of years is repudiated by its receiver, and the leased premises are abandoned, there is a final breach of such contract. The lessor should immediately declare the breach to be total, and in the insolvency proceedings must be allowed to establish his claim for damages against the estate.—MINNEAPOLIS BASEBALL CO. V. CITY BANK, Minn., 76 N. W. Rep. 1025.

66. LIBEL — Statements Conditionally Privileged.—Where an alleged libel was made under qualified privilege, plaintiff must prove that the publication was malicious and without probable cause.—HENRY V. MOBERLY, Ind., 51 N. E. Rep. 497.

67. LIFE INSURANCE—Construction—Term Policy.—A life policy provided that, on default in payment of premiums without surrender, it should become a paid-up term policy for a certain length of time, when the contract should cease. Insured defaulted, and six months thereafter executed a note for the premium due, providing that, if not paid at maturity, the policy should become void. It was not shown that the beneficiary executed the note. Held, that on default the policy became a term policy, and insured could not reinstate the original policy without the consent of the beneficiary.—UNION CENT. LIFE INS. CO. V. WILKES, Tex., 47 S. W. Rep. 546.

68. LIFE INSURANCE—Failure to Pay Premiums.—Where an insurance company's agent told the insured, when his policy was taken out, that the company would send a collector of premiums to his house between the 1st and 10th of each month, and that payments should be made to him, and the insured had the money ready, but no collector came, and he was not notified that he could pay elsewhere, the policy did not lapse because of delay in payments.—BAKER V.

MICHIGAN MUT. PROTECTIVE ASSN., Mich., 76 N. W. Rep. 970.

69. LIFE INSURANCE—False Answers in Application.—Section 3625, Rev. St., is a valid constitutional enactment, and, to constitute a defense to a policy of insurance by reason of false answers to questions in the application, it must be clearly proven that the answers to such questions were willfully false and were fraudulently made; that the same were material, and induced the company to issue the policy, and that but for such answers the policy would not have been issued; and that neither the company nor its agents had knowledge of the falsity or fraud of such answers at and before the delivery of the policy.—JOHN HANCOCK LIFE INS. CO. v. WARREN, Ohio, 51 N. E. Rep. 546.

70. LIMITATIONS—Adverse Possession — Interruption by Civil War.—Pasch. Dig. art. 4631, providing that all statutes of limitations should be suspended until one year after the close of the civil war, and art. 4631a, providing that the time during which the war existed should not be counted in the application of any statute of limitations, and Const. 1869, art. 12, § 43, providing that the statutes of limitations should be suspended from the act of secession until "the acceptance of this constitution by the United States," and Rev. St. 1895, art. 3866, declaring that the laws of limitation were suspended during the civil war, do not have the effect of tacking adverse possession before the war with that had after an abandonment during the war.—COLLIER v. COUTS, Tex., 47 S. W. Rep. 525.

71. LIMITATIONS—Statutes.—The special limitation of six months, provided by the charter of cities of the first class as to actions against such cities for damages is in violation of Const. § 59, providing that the general assembly shall not pass local or special acts to regulate the limitation of civil or criminal causes, and is not authorized by section 156 of the constitution, which provides for the classification of cities only for the purpose of organization and government.—CITY OF LOUISVILLE v. KUNTZ, Ky., 47 S. W. Rep. 592.

72. LIMITATION OF ACTIONS — Notes.—Payments by a joint-stock association of interest on a note, which its president had signed as surety, does not toll the statute of limitations as to the latter, for the obligation is joint and several.—STEVENS STORE CO. v. HAMMOND, Ind., 51 N. E. Rep. 506.

73. MASTER AND SERVANT—Assumed Risks—Defective Appliances.—A servant operating an elevator according to instructions given by his master is not bound to know that it is dangerous, merely because he knows that the brake on it is out of order.—UNION SHOW-CASE CO. v. BLINDAUER, Ill., 51 N. E. Rep. 709.

74. MASTER AND SERVANT — Negligence — Assumed Risks.—A servant, though he knows the danger incident to the use of an appliance, does not, by using it at the direction of his master in a service not incident to his employment, assume the risk, unless the danger is such that an ordinarily prudent man would not encounter it.—DALLEMAND v. SAALFELDT, Ill., 51 N. E. Rep. 645.

75. MASTER AND SERVANT — Negligence—Fellow-servants.—Where a master, in connection with the erection of a smokestack next to a building, erected a hoisting apparatus so near it that the rope and tackle became entangled with an iron shutter, causing it to fall and kill a servant working about the smokestack, the fact that deceased and the men operating the hoisting apparatus were fellow-servants does not affect the right to recover for his death, since the negligence relied on was that the apparatus was not properly erected.—LEONARD v. KINNARE, Ill., 51 N. E. Rep. 688.

76. MORTGAGE—Foreclosure—Mining Property.—The lessee of a mine who took his lease with knowledge of the existence of a mortgage thereon, and continued to work the mine during a receivership, pending foreclosure of the mortgage, is not entitled to claim the entire product as against the mortgagee, on the ground that its value is less than the cost of its production, where the mine was fully developed, and his working reduced, rather than increased, its value.—FIRST NAT. BANK OF HAILEY v. G. V. B. MIN. CO., U. S. C. C., D. (Idaho), 89 Fed. Rep. 449.

77. MORTGAGE — Mistake in Description.—Where, by mistake, a different description of land from that intended was written in a mortgage, but the mortgagors, who were the owners of both tracts, afterwards, with knowledge of the mistake, sold and conveyed the tract intended to be included, such act operated as a ratification upon their part of the mortgage as written.—NORTHWESTERN & P. HYPOTHEEK BANK v. BERRY, U. S. C. C., D. (Idaho), 89 Fed. Rep. 408.

78. MORTGAGE—Railroad Company.—A railroad mortgage, in terms covering the entire line of road from one terminus to the other, is valid as to the entire line, though a portion of it was unbuilt when the mortgage was executed.—CENTRAL TRUST CO. OF NEW YORK v. CHATTANOOGA, R. & C. R. R., U. S. C. C., N. D. (Ga.), 89 Fed. Rep. 388.

79. MUNICIPAL CORPORATIONS—Assessors—Compensation.—A petition by a county assessor for compensation authorized by Gen. St. 1883, § 3353, for work done by him to facilitate the collection of city taxes, is insufficient, where it fails to allege that he had disclosed to the city council the character and extent of his services when he presented his claim.—WALPOLE v. CITY OF PUEBLO, Colo., 54 Pac. Rep. 910.

80. MUNICIPAL CORPORATIONS—Grading Contracts—Assessments.—A city cannot be held generally liable on its failure to comply with a provision in a street grading contract, to duly and without neglect collect the special assessments to pay the warrants, where the improvements are constructed under the assessment plan against the property specially benefited, and not at the expense of the city generally.—NORTHWESTERN LUMBER CO. v. CITY OF ABERDEEN, Wash., 54 Pac. Rep. 935.

81. MUNICIPAL CORPORATIONS — Injunction—Assessments.—An injunction should not issue to restrain the paving of streets in a city on the ground of inequality of the assessment, where the charter provides that, when any court shall adjudge any special assessment illegal, the council shall, whether the assessment has been paid or not, have power to cause a new assessment to be made.—BOGERT v. JACKSON CIRCUIT JUDGE, Mich., 76 N. W. Rep. 983.

82. MUNICIPAL CORPORATIONS—Paving—Ordinances.—An ordinance providing for the paving of a street to conform to the established grade of the street, "as shown by an ordinance fixing the grade of said street now on file in the office of the city clerk," is a sufficient description of the grade, under 1 Starr & C. Ann. St. (2d Ed.) p. 751, art. 9, § 19, providing that, whenever a local improvement is to be made, the ordinance shall specify the nature and description thereof "by reference to maps, plats, plans, profiles or specifications thereof on file in the office of the proper clerk."—CHICAGO & N. P. R. CO. v. CITY OF CHICAGO, Ill., 51 N. E. Rep. 596.

83. MUNICIPAL CORPORATIONS—Sidewalks—Construction—Necessity.—Under Sidewalk Act April 15, 1875 (Hurd's Rev. St. 1897, p. 309), authorizing a village to construct sidewalks, that an ordinance requires the construction of a sidewalk in a thinly-settled part of a small village, where there is no great necessity for it, does not show that the ordinance is so unreasonable, unjust and oppressive as to justify interference by a court of equity.—WALKER v. VILLAGE OF MORGAN PARK, Ill., 51 N. E. Rep. 686.

84. MUNICIPAL CORPORATIONS—Street Improvements—Validity of Contracts.—Under a city charter authorizing the city council to improve streets by vote of two-thirds of its members, and on consent of a majority of abutting property owners, and an ordinance requiring street improvements over a certain cost to be let to the lowest bidder, unless the council otherwise order, and requiring the mayor "and proper committee" to advertise for proposals, and on reception thereof to let the work to the lowest bidder, the city council may

let contracts for street improvements without advertising for bids, the ordinance applying only to the mayor and committee.—CITY OF WACO v. CHAMBERLAIN, Tex., 47 S. W. Rep. 527.

85. MUNICIPAL CORPORATIONS—Taxation of Telegraph Company.—A city may lawfully impose a license tax upon the poles and wires of a telegraph company maintained within its limits to cover the expense to which it is put in the enforcement of its police regulations by reason of the existence of such poles and wires, though the company is a corporation of another State, and engaged in interstate commerce.—CITY OF PHILADELPHIA v. WESTERN UNION TEL. CO., U. S. C. C. of App., Third Circuit, 89 Fed. Rep. 454.

86. MUNICIPAL IMPROVEMENTS — Validity of Ordinance.—An ordinance providing for a sewer from a fixed point to another established point, of a certain shape and an established diameter, constructed of sewer brick, in a particular manner, with a tile-pipe sewer 12 inches in diameter, sufficiently describes the nature, character, locality and description of the proposed improvement.—HYNES v. CITY OF CHICAGO, Ill., 51 N. E. Rep. 705.

87. NEGLIGENCE—Linemen—Risk of Falling Poles.—A lineman will be presumed to have assumed the risk of the breaking and falling of poles of uncertain age, while he is working on them, by reason of decay below the surface of the ground.—MCISAAC v. NORTHAMPTON ELECTRIC LIGHTING CO., Mass., 51 N. E. Rep. 524.

88. OFFICERS — Authority — Collateral Attack.—Authority of one acting as justice of the peace under an appointment cannot be questioned in replevin for goods levied on under judgment rendered by him.—GRIM v. ADKINS, Ind., 51 N. E. Rep. 494.

89. PARTNERSHIP — Assignment of Property.—Two partners composing one firm were also members of another firm which had a third member. The latter firm, on the retirement of the third member, mortgaged its property to secure debts of both firms. Held, that the creditors of the latter firm had no lien on its assets, and, therefore, in the absence of fraud, the mortgage was valid as against them.—SELZ, SCHWAB & CO. v. MAYER, Ind., 51 N. E. Rep. 485.

90. PARTNERSHIP—Note—Liability of Continuing Partners.—Where, after a member silently withdrew from a trading firm, and the other members continued the business without changing the firm name, or giving notice of his withdrawal, he discounted at a bank, which had dealt with him in similar transactions before, a note payable to the order of the firm, and which he executed and indorsed in the firm name, representing to the indorsee that he was still a member, and wrongfully applied the funds thus secured to his personal use, without the knowledge or consent of his former co-partners or the indorsee, who took it in good faith, all the members are liable thereon.—CHICAGO TRUST & SAVINGS BANK v. KINNARE, Ill., 51 N. E. Rep. 607.

91. PARTNERSHIP—Special Partners.—Where one who attempted to become a special partner became liable to third parties as a general partner for non-compliance with Mill. & V. Code, §§ 2399-2422, and he, by will, continued such partnership for the benefit of his estate, the relation of the estate to third parties is that of general partner, and the liability of the estate to creditors for firm debts is not an asset in the hands of assignees of the firm, under an assignment by the surviving general partner.—SAVAGE v. CARNEY, Tenn., 47 S. W. Rep. 571.

92. PLEADING—Reply—Counterclaim.—An answer in replevin, that defendant is estopped from claiming the goods because he permitted defendant to take possession thereof as assignee for the benefit of creditors of one claiming to be the owner, and acquiesced in defendant's disposal thereof as such assignee, does not plead a counterclaim, within Code Civ. Proc. § 691, defining a counterclaim as a cause of action in favor of defendant, tending to defeat or diminish plaintiff's recovery.—BABCOCK v. MAXWELL, Mont., 54 Pac. Rep. 943.

93. PRINCIPAL AND AGENT — Ratification. — Actual knowledge by a principal of his agent's acts is essential to a ratification of the acts.—IRON CITY NAT. BANK OF LLANO v. FIFTH NAT. BANK OF SAN ANTONIO, Tex., 47 S. W. Rep. 533.

94. PRINCIPAL AND SURETY—Bonds—Surety's Obligation.—A surety on a bond, conditioned for the performance of a builder's written contract according to specifications, may insist on the strict terms of his obligation, and claim a discharge for a material alteration of the contract, though made for his benefit.—STILLMAN v. WICKHAM, Iowa, 76 N. W. Rep. 1008.

95. PRINCIPAL AND SURETY—Distinction between Suretyship and Guaranty.—The distinction between the obligating of a surety and a guarantor is that the surety undertakes to pay if the principal does not, while the guarantor undertakes to pay if the principal cannot.—MCINTOSH-HUNTINGTON CO. v. REED, U. S. C. C., W. D. (Penn.), 89 Fed. Rep. 464.

96. PRINCIPAL AND SURETY—Pleading.—In an action upon a note, against the surety, who pleaded a discharge by reason of plaintiff's failure to bring action thereon when requested, a reply alleging a subsequent request by defendant to plaintiff not to sue thereon sufficiently sets out a waiver of the request, so as to warrant the introduction of proof.—ROTTING v. CLEMAN, Wash., 54 Pac. Rep. 935.

97. PROHIBITION.—A peremptory writ of prohibition will issue to prevent the superior court from taking jurisdiction of an appeal from a judgment obtained before a justice if the notice of appeal was served before it was filed.—STATE v. SUPERIOR COURT OF SPOKANE COUNTY, Wash., 54 Pac. Rep. 937.

98. PUBLIC LANDS—Homestead.—A homesteader under the laws of the United States entered, resided upon, cultivated and improved his claim for more than five years, but died without making his final proofs. His widow made them, and complied in all things with the provisions of section 2291, Rev. St. U. S. Her proofs were accepted as sufficient by the land officers, but by mistake the patent for the land was issued to his heirs instead of her. Held that, upon such compliance by her with the law, she became the equitable owner of the land, and that the patentees hold the legal title in trust for her, and that a court of equity will enforce the trust.—HAYES v. CARROLL, Minn., 76 N. W. Rep. 1017.

99. QUIETING TITLE—Possession—Occupancy.—Lands occupied by a squatter without color of right of possession are not vacant, within the rule that one out of possession cannot sue to quiet title unless the lands are vacant.—GLOS v. GOODRICH, Ill., 51 N. E. Rep. 643.

100. RAILROAD COMPANY—Damages—Injury to Property.—When a railroad company has laid upon and along a street of a city a railroad track, and is running trains thereon, and the owner of abutting improved property, in an action brought under section 3283, Rev. St., to recover damages on account thereof, specifically alleges that the injuries of which he complains were caused by noises, smoke, dust and sparks of fire, resulting from passing locomotives and cars, but does not set up any easement, fee or other interest in the street, or aver any injury thereto, he should not be permitted on the trial of the action, over the objection of the railroad company, to establish, as the measure of his recovery, the difference between the value of the property before and after the track was laid.—BALTIMORE & O. R. CO. v. LERSCH, Ohio, 51 N. E. Rep. 543.

101. RELIGIOUS SOCIETIES—Division of Church Members.—The trustees of a church having the title and possession of the church property and the possession of the church records, in an action by them to enjoin excluded members from trespassing on the church property the burden is on defendants to show that there is such a division of the church as to entitle each

faction to the use of the church property.—IGLEHART v. ROWE, Ky., 47 S. W. Rep. 575.

102. RES JUDICATA—Pleading.—After a seizure and sale of property under a chattel mortgage, the mortgagee sued for the expenses of the sale, and for a balance due. The mortgagor pleaded as a defense, that the seizure and sale were wrongful. Held, that a judgment in such case was conclusive as to the lawfulness of the seizure, in an action by the mortgagor for the unlawful seizure of the property.—REYNOLDS v. MANDEL, Ills., 51 N. E. Rep. 649.

103. SALE—Conditional Sale.—Instruments on which this action was based construed. Held to be conditional contracts of sale, not differing materially from the instruments considered in C. Aultman & Co. v. Olson, 45 N. W. Rep. 852, 43 Minn. 409; and, following that case, that no action can be maintained thereon against the vendee after the property which was the expressed consideration for the execution and delivery of the same has been taken from him by the vendor.—KEYSTONE MFG. CO. v. CASSELIUS, Minn., 76 N. W. Rep. 1028.

104. SALE—What Constitutes.—A contract of sale was duly executed, containing conditions for deferred payments, and for assuming debts. Held, that the sale was "consummated," so as to entitle the agent to commissions for effecting it, although the conditions were never complied with.—MICKS v. STEVENSON, Ind., 51 N. E. Rep. 492.

105. SCHOOLS—Boards of Education—Change of Text-Books.—School law, art. 5, § 26 (Hurd's Rev. St. 1889, p. 1235), providing that the board of directors of each district "shall not permit text-books to be changed oftener than once in four years," applies to boards of education in school districts having more than 1,000 and less than 100,000 inhabitants; since by article 6, § 1, such boards are subject to this provision, unless said article provides otherwise, and there is nothing therein showing an intent to exempt them therefrom.—PEOPLE v. BOARD OF EDUCATION OF SCHOOL DIST. NO. 5, Ill., 51 N. E. Rep. 683.

106. SCHOOL DISTRICTS — Change of Boundaries.—Where school trustees, having jurisdiction, change the boundaries of school districts, but the clerk's record thereof fails to show jurisdiction, it may, after having once been proved by them, be corrected so as to show such jurisdiction; and this even after a change in the *personnel* of the board.—BOARD OF EDUCATION OF DIST. NO. 1 v. TRUSTEES OF SCHOOLS OF TOWNSHIP NO. 42, Ill., 51 N. E. Rep. 656.

107. SPECIFIC PERFORMANCE—Written Agreement.—Specific performance of a contract for the conveyance of real estate, where there has been no delivery of possession, cannot be enforced unless it is in writing.—MACKEY v. MAGNON, Colo., 54 Pac. Rep. 907.

108. TAXATION—Fraudulent Assessment—Injunction.—Equity has jurisdiction to restrain collection of an excessive assessment, fraudulently levied to enable the assessor to obtain a bribe for reducing it, unless there are sufficient statutory remedies.—NEW HAVEN CLOCK CO. v. KOCHERSPERGER, Ill., 51 N. E. Rep. 629.

109. TAXATION—Injunction—Tender.—Where the collection of a tax is attempted to be enjoined for the reason that the per cent. is higher than allowed by law, the legal rate must be paid or tendered before the injunction can be sustained.—MCINTIRE v. WILLIAMSON, Kan., 54 Pac. Rep. 928.

110. TAXATION — Property Subject.—The stock and franchise of a corporation "to furnish light, heat and power for public and private uses" are assessable by the State board of equalization, since it is not a purely manufacturing corporation, within Rev. St. ch. 120, § 8, providing that corporations for purely manufacturing purposes shall be assessed by local assessors.—EVANSTON ELECTRIC ILLUMINATING CO. v. KOCHERSPERGER, Ill., 51 N. E. Rep. 719.

111. TELEGRAPH — Delaying Messages — Damage.—Where members of a firm telegraphed another member, who was their buyer, to close an option to purchase cattle at a certain price, and the telegraph company negligently delayed the message, so that it did not arrive until after the option expired, the damage sustained is the difference between the contract price and the market price at the place of purchase on the day on which the option expired, excluding speculative advances in price at later times.—BREWSTER v. WESTERN UNION TEL. CO., Ark., 47 S. W. Rep. 560.

112. TRIAL—Jury Trial—Waiver.—Where a complainant brings a suit in equity, and presses it to a hearing on the merits over defendant's objection to the jurisdiction, he waives his right to a jury trial.—SOUTHERN DEVELOPMENT CO. OF NEVADA v. SILVA, U. S. C. C., N. D. (Cal.), 89 Fed. Rep. 418.

113. TRIAL — Motion to Instruct for Defendant.—The rule that, where there is a scintilla of evidence tending to support the case of a party who has the burden of proof, it should be submitted to the jury, does not prevail in Illinois.—OFFUTT v. WORLD'S COLUMBIAN EXPOSITION CO., Ill., 51 N. E. Rep. 651.

114. TRIAL — Special Verdict—Evidence.—The jury may not return the primary facts on evenly balanced evidence, where the burden of establishing the ultimate fact rests on the party in whose favor the primary facts are returned.—CITIZENS' ST. R. CO. v. REED, Ind., 51 N. E. Rep. 477.

115. USURY—Change of Payee of Note.—The change of the payee in a note is not a payment of usury embraced therein, though the parties go through the form of passing checks.—SHIRLEY v. STEPHENSON, Ky., 47 S. W. Rep. 581.

116. VENDOR AND PURCHASER—Contract.—A contract provided that a merchantable abstract of title should be furnished within 10 days, and a deed delivered within 3 days after the title was perfected. Held, that it was intended that abstracts should be furnished in 10 days, title perfected within a reasonable time, and the deed delivered within 3 days thereafter.—EVANS v. GERRY, Ill., 51 N. E. Rep. 615.

117. VENDOR AND PURCHASER—Vendor's Lien—Foreclosure.—A lienholder stating that his lien had been paid, and thereby inducing a senior lienholder to accept vendor's lien notes for a release of his lien, becomes a party to the vendor's lien in its inception by virtue of estoppel, and may be made a party to a suit to foreclose the lien.—SCHARFF v. WHITAKER, Tex., 47 S. W. Rep. 519.

118. WATER COURSES—Riparian Rights—Diversion.—Where a riparian proprietor seeks the aid of a court of equity to restrain a corporation from diverting water for public purposes which it has the power to condemn, and the corporation offers to pay such sum as the court shall deem to be just compensation, and complainant consents, the court has jurisdiction to ascertain the amount of such compensation.—SPARKS MFG. CO. v. TOWN OF NEWTON, N. J., 41 Atl. Rep. 385.

119. WATER RIGHTS—Enjoining Diversion of Water—Parties.—One of a number of owners in common of a dam, flume and irrigating ditch, who, by agreement, divide the water flowing in the ditch between them, may alone maintain a suit to enjoin the diversion by a subsequent appropriator of any portion of the water to which either he or his co-tenants are entitled.—RODGERS v. PITT, U. S. C. C., D. (Nev.), 89 Fed. Rep. 420.

120. WITNESS—Divorced Wife.—Sand. & H. Dig. § 2916, subd. 4, prohibiting husband and wife during existence of the marriage relation, and thereafter, from testifying against each other concerning any communications made to each other during marriage, does not prevent a divorced wife from testifying against her former husband as to facts which did not become known during marriage.—INMAN v. STATE, Ark., 47 S. W. Rep. 559.

121. WITNESS—Husband and Wife.—A wife cannot testify to communications made by her husband during coverture, even after the marriage relation is severed.—GEER v. GOUDY, Ill., 51 N. E. Rep. 628.

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